



THE UNIVERSITY *of* EDINBURGH

This thesis has been submitted in fulfilment of the requirements for a postgraduate degree (e.g. PhD, MPhil, DClinPsychol) at the University of Edinburgh. Please note the following terms and conditions of use:

- This work is protected by copyright and other intellectual property rights, which are retained by the thesis author, unless otherwise stated.
- A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.
- This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author.
- The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author.
- When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given.

PUNISHMENT, MONEY AND LEGAL ORDER: AN ANALYSIS OF
THE EMERGENCE OF MONETARY SANCTIONS WITH SPECIAL
REFERENCE TO SCOTLAND



Peter John Young

Ph.D. Thesis,
University of Edinburgh.
1987

DECLARATION

I the undersigned declare that this thesis has been composed by me and is a record of my work. No part of it has been submitted for another degree at this or any other University.

P. Young.

UNIVERSITY OF EDINBURGH

ABSTRACT OF THESIS (Regulation 7.9)

Name of Candidate PETER JOHN YOUNG

Address

Degree Ph.D. Date October, 1987

Title of Thesis PUNISHMENT, MONEY AND LEGAL ORDER: AN ANALYSIS OF THE EMERGENCE OF
..... MONETARY SANCTIONS WITH SPECIAL REFERENCE TO SCOTLAND

No. of words in the main text of Thesis 90,000

This thesis is a study of monetary sanctions, in particular the fine, set in the broader context of the relationship between punishment, money and legal order. The purpose is to analyse the way in which money enters into penal relations.

The thesis is divided into two main parts, the first of which begins by identifying a paradox in the structure of contemporary, sociological explanations of punishment. This paradox may be rendered thus; why is the fine much used but little studied? Why do contemporary sociological accounts endeavour to explain the penal system with little or no reference to the most commonly used of all penal sanctions, the fine? A number of factors accounting for this paradox are suggested, but most important of all, it is argued, the paradox reflects a broader, cultural estrangement of punishment from money. By this is meant that money is unable to fulfil our cultural expectations of what punishment ought really to be like. The nature of this process of estrangement is explored via an analysis of why, in serious crimes like rape, fines are seen as inappropriate sanctions. It is argued that this process of estrangement captures both an historical process and a contemporary reality. Historically, money was once used to deal with the full range of crimes and offences. However, for reasons which are explained, this relationship has been shattered. In the modern penal system, punishment and money are estranged. The phenomenon of estrangement is clearest only at a certain level of the penal system - that level at which grand claims for its legitimacy are debated and discussed. Beneath this, the system relies on the fine in an increasing number of crimes and offences.

The second part of the thesis uses concrete, empirical data, gathered by a variety of methods, to explore the place of the fine in the contemporary Scottish criminal justice system. The explanation is carried out in the light of the more general themes developed in the first part of the thesis. By analysing official data, it is shown that fines are now used in fairly serious crimes, particularly the property ones. The thesis then turns to an examination of how a group of sentencers, sheriffs, use the fine. This analysis is conducted by using data collected by the interview method.

The thesis concludes by considering the significance of its findings for the contemporary sociology of punishment and for our understanding of modern penal practice.

^E FORWARD AND ACKNOWLEDGEMENTS

My interest in the topic of this thesis was stimulated by the perception of what I saw as a paradox; nobody wrote on the fine, nobody was interested in it, yet it is the most common sanction used. Indeed, fines, it seemed to me, had the status in criminological literature of an academic pissoir; a place where the species of visit is naturally brief. This thesis is my attempt to explain why the fine has been ignored and also to say something about it.

I have incurred many debts in doing the research and writing up the results. My colleagues in the Centre for Criminology and the Social and Philosophical Study of Law have always been patient, kind, and encouraging. Several individuals deserve special mention. Some of the materials used are derived from research done many years ago under my direction with Kelvin Jones and Ewan MacLean. They collected with me some of the data reported in Chapters 4 and 6. However, the final product, is entirely my own work and they bear no responsibility for it or its shortcomings. My colleagues in the Scottish Legal History Group, particularly J. Cairns, H. McQueen and D. Sellar, listened and gave welcome advice. Professor D. N. MacCormick read an earlier draft of my chapter on legal reasoning and has generally lent me much support, as has my supervisor, Professor F. H. McClintock; I thank them both. The three individuals who I single out are Zenon Bankowski, Beverly Brown and David Garland. All have variously bullied, probed and occasionally flattered me. This is especially true of the last two; without them the work could not have been finished. Lydia Lawson, Sheila Smith, Carol Jones and Nikos Passas all typed parts of the thesis and I am extremely grateful to them for this.

Finally, my family have put up with a good deal of neglect over a number of years and have done so in reasonable good humour.

CONTENTS

	<u>Page</u>
General Introduction	1
<u>PART ONE</u>	
Chapter 1 Criminology, Punishment and Money	12 - 49
Chapter 2 The Cultural Estrangement of Punishment from Money	50 - 73
Chapter 3 "Making fine: Being fined:" Towards an historical analysis of Monetary Sanctions	74 - 116
<u>PART TWO</u>	
General Introduction	117 - 120
Chapter 4 The Structure of Sanctions and the use of the Fine 1897 - 1978	121 - 172
Chapter 5 Legal Rules, Rationality and the Normative Practice of Sentencing	173 - 208
Chapter 6 Working Legal Rules: Money and the Sense of Justice	209 - 258
Chapter 7 Default and Discipline	259 - 301
Chapter 8 Conclusion	302 - 315

General Introduction

Themes and Purposes of the Inquiry

Imagine we commission a stranger - say a Martian (the same one who haunts so much philosophical and sociological literature) - to undertake a survey of our penal system so that we may better understand it. Suppose also that the Martian reasons in a broadly similar way to us (otherwise the exercise is a non-starter) and that we provide, as primary sources, the officially published criminal statistics but no general commentary of an academic or policy kind. (We voluntarily adhere to this restriction precisely because we want to gain the benefits of a "fresh mind" looking at our problems.) In these circumstances, it seems to me the Martian would deliver a report containing a view of our penal system probably very different from that in the contemporary literature. The difference, I suggest, would be this. If the Martian characterised our penal system by reference to its most frequently occurring and regular part, it follows he would spend a considerable time discussing the fine, as it is by far the most commonly used sanction. Indeed, he would probably say it is a system in which earthlings punish people by taking money away from them for the crimes and offences they commit.

If we were now to compare his account with that in the relevant literature there would be a stark contrast. Although there cannot fail to be some mention of the fine, its overwhelming focus centres on what may be called the "bodily punishments" - those punishments inflicted on the body, the mind and the character of the offender. In particular, the focus is directed on the prison as the exemplar and

paradigm, of contemporary punishment, with some considerable attention also being spent on various forms of treatment or rehabilitation.

In a strict sense the situation described in this example is beyond proof, precisely because it is imaginary and hypothetical - we do not know, after all, if Martians exist. In other respects, however, and with allowances for necessarily incurred simplification, it does highlight a central problem faced in the study of the fine and, it is contended, in contemporary explanations of punishment.

The problem is that there appears to be a paradox in the way we understand and explain punishment. Reduced to its simplest terms, the paradox may be rendered thus - why is the fine much used but little studied? Why, if the fine is the most commonly used of all penal sanctions, do there exist so very few studies of it? And, finally, why do we take as the exemplar of modern punishment the prison, when it is a relatively little used sanction? (For details backing this latter claim, see chapter 4.)

The answer to these separate but related questions is that fines - or other types of monetary sanction - are little studied because they do not appear in any major way on the explanatory agendas of any of the disciplines that are concerned with crime and punishment - criminology, philosophy, law, sociology and history. Although the agendas of these disciplines differ in many ways all share one trait which accounts for the non-appearance of the fine on them. They exhibit what may be called a "cultural estrangement" between their conceptions or images on the one hand of punishment and of money on the other. By cultural estrangement is meant, quite literally, the two concepts "turn away" from each other; they face away from each

other like strangers. We can see the results of this estrangement at work in the criminal court. While, for instance, it is generally regarded as legitimate to use fines to deal with the minor regulatory offences that make up so much of the work of the criminal court, there is a resistance to using them, save in exceptional circumstances, for serious crimes. Reflect on how difficult it is, for example, for sentencers to use the fine in rape cases - who dares fine the rapist? Now, while legally fines could be used in these circumstances, there exists a well known practice that makes it a near impossibility. Why should this be so? Why, if fines are a possible sanction, is it not permissible to use them here? Later we will discuss the matter in detail, but our essential argument is that even very large fines are not used in such cases because money fails to fulfil general cultural expectations of what punishment ought really to be like.

We shall argue later that the reasons for the existence of the estrangement of punishment from money are essentially cultural and historical. They have to do with the emergence, over a long period, of the typically modern view of the nature of punishment as a harm (normally imprisonment) visited upon offenders who have broken rules presumed to be public and enforceable only by the representatives of the collective, the state. But at this stage of the argument, our suggestion is that the intellectual disciplines mentioned above work with a view of punishment that accepts its estrangement from money. Fines and other monetary sanctions in consequence drop out of sight, they remain beyond the conceptual and empirical scope of the disciplines. As a result these disciplines exhibit the explanatory paradox referred to; they endeavour to explain the nature of

punishment with little or no reference to the sanction most commonly used, the fine.

This makes the position of our Martian most difficult. His description of our penal system as one founded in the use of money has been generated by methods we conventionally consider to be good. Normally, in the social sciences, empirical regularity is taken to be a necessary, although not always a sufficient condition of establishing the significance of a topic. Crudely put, the more common a thing is, the more importance and significance attributed to it. For example, theorists identify periods of history or types of society and social structure by characterising them in terms of the regular dominance of certain types of social relationships. Modern society is characterised as a capitalist society, not just because there are a few examples of capitalist social relations, but because these relations are the most common ones. Durkheim uses just this logic in his rules for distinguishing between normal and pathological social facts. The first rule, to paraphrase, states that if something is a regular feature of every society, at every stage of its development, it meets one (necessary) condition to qualify for normality. In other words, crude, regular and statistically recordable occurrence is typically taken as a *prima facie* ground for establishing the importance of an object as being worthy of study.

In our example, the Martian acts, as it were, as the disciplined social scientist; he establishes the significance of different penal practices by using just the sort of empirical reasoning normally recommended - and the result is the hypothetically different account of our penal system. But, judged by the lexicon of contemporary

literature the Martian is importantly wrong. On this basis, we would say "yes, your account is empirically accurate in certain ways, but you have just not understood what we earthlings mean by punishment; fines are not really punishments; this is why our attention centres on the prison, and methods of treatment - the bodily punishments". In saying this, we would in effect be telling the Martian that he is not familiar with the rules we use to identify and define certain acts as punishment. His status as an outsider has deluded him. The poor Martian, at the same time, is both a disciplined social scientist and a magnificent cultural dupe.

There may be some ungenerous souls who experience no surprise at this situation in the sense that they believe all social scientists to be dupes, cultural and otherwise. But the example, and our commentary on it, illustrates the very complex, empirical and conceptual issues to which study of the fine gives rise. Studying the fine then, in anything other than a circumscribed and technical way, involves one in discussing some very complex questions without the benefit of much previous literature. There is no equivalent of a Foucault on the fine or of the rich tradition of sociological and historical studies of the prison. There is, it is readily admitted, some literature, but this tends to be overwhelmingly technical in nature, concerned with narrow administrative problems in the collection, enforcement or effectiveness of fines (Latham, 1973; Bottoms, 1973; Smith and Gordon, 1972; Sparks, 1973; Morgan and Bowles, 1981; Softley, 1973, 1978; Grabing, 1981; Millar, 1985). Of course, such studies do provide valuable information and we should not blindly disregard them, but

their self-imposed limitations mean that broader and arguably more fundamental questions do not get asked. There are a few, scattered studies which do endeavour to "go deeper" - such as the one chapter in Rusche and Kirchheimer's Punishment and Social Structure (1939), the highly condensed section on money and personal values in Simmel's Philosophy of Money (1978), and, most recently, Bottoms' paper which, indicatively, is entitled "Neglected Features of Contemporary Penal Systems" (1983). These are innovative and interesting, but do not constitute extended treatments of the relationship between punishment and money, not least because in each the topic is subordinated to the assessment or demonstration of a more general thesis. This, of course, is not wrong but it does mean that knowledge of the fine and particularly of its broader, social and sociological significance remains rudimentary. The best one can say of these three pieces, to adopt Kuhnian language, is that they constitute the first anomalies to the dominant paradigm within which punishment is discussed and analysed.

To propose to study the fine in the broader context of the relationship between conceptions of punishment, money and legal order is therefore not only to work in partial light, but, just as importantly, is to go against the grain. At the very least, it is to question the explanatory agenda of the most immediately relevant discipline, that of criminology, and possibly also those of sociology, law and history in as much as they are concerned with crime and punishment. I do not claim to be the first to realise the potential of the fine to question agendas and orthodoxies. For example in 1939, Hermann Mannheim wrote,

"Both as regards the public interest it arouses as well as in the amount of scientific study devoted to it, the fine is the Cinderella among penal methods. We should not, however, overlook its great social significance." (Mannheim 1939, p.127)

Mannheim did not go on to demonstrate either its "great social significance" or to devote much time to the study of it, and this might seem peculiar in a book explicitly on "the economic factor in the penal problem" (Mannheim 1939, p.33). Rather, he retreated by employing what I understand to have been one of his rarer traits - humour - to diffuse the point. Talking of the fine, he said,

"There is an entire lack of sensation, mysticism and romance around this method of punishment. It is said to be not too difficult to make money out of prison memoirs, but who would buy a book with the title, 'How I paid my fines'." (Mannheim 1939, p.127)

My task in this book is to try and demonstrate what Mannheim failed to do and others have only partially succeeded in doing. That is, to show how and why fines - or more generally the ways in which money enters into penal relations - are of great interest and significance and that criminology is impoverished because of its ignorance of them.

My thesis reduced to its bare bones can be expressed in the following clusters of propositions:

- (1) that existing histories and sociologies of punishment are too narrow by far. Their core theme has been to trace the history and practice of punishment as it has worked along one vector only - the relationship between punishment and the body. They have shown how punishment takes the form first of physical attacks on the body of the individual and then, second, of attacks on the "inner attributes" such as character and soul, mostly by placing limitations on the liberty of the individual. It is in this context that the concentration on the prison and methods of treatment is understandable.
- (2) However, to this must be added the story of another vector along which punishment has developed. Along this second vector, punishment takes the form of the exchange or enforced deprivation of resources, normally money (but sometimes other material resources as well), as a way of paying for harms done. The history of the second vector has yet to be adequately explored or developed but its significance ought to be clear. Fines and other monetary sanctions belong within it, so to understand and explain their significance we must come to terms with the social conditions which form this vector's structure. The title of this thesis alludes to these conditions; to explain the fine, we must unravel the complex and changing connections between punishment, money and legal order: we must note the ways in which different legal orders arise, their structure and nature, the reciprocal connections they have with conceptions of punishment, and how money enters into the equation as a force in its own right.

(3) Supporting these broad, master themes, there are a number of other more focused and concrete ones. Perhaps the most significant of these surrounds a notion that has already been introduced - the idea of the cultural estrangement of punishment and money. This notion plays an important role in my argument.

It captures both an historical process that is claimed to have occurred and describes also a present reality that is proposed to exist. In the chapters that follow I argue that once it was quite common for money to be brought into a direct relationship with criminal harms and for this to be seen as legitimate; historical actors would have evinced no surprise at situations in which money was used to deal with the most serious of criminal harms. This once intimate relationship between money and punishment has been shattered, with the result that money is now estranged from our conceptions of punishment. But this estrangement exists most clearly only at a certain level of the modern penal system - in the general, discursive one in which grand claims for the legitimacy of the system are made and debated. Beneath this level, however, in the day-to-day running of the penal system, there is an ever increasing reliance on the fine.

Quite clearly more will have to be said about this notion of estrangement and about how the modern system while dissociating money from punishment yet relies heavily upon the fine. The second part of the thesis is concerned in particular with the latter issue.

These then are the broad themes of my inquiry. It ought already to be possible to see that it works on a number of different levels or planes. It tries, first, to put right an anomaly - the more or less complete ignoring of the fine in contemporary accounts of the nature

of punishment. But it also endeavours to raise a number of explanatory and empirical issues that challenge the way theorists have gone about their task. In particular, as will be shown, it argues for a revival of certain aspects of a more traditional vocabulary in which punishment has been discussed. One of the strange features of much of the contemporary sociological literature on punishment is its suppression of a theme with deep roots - the relationship between penal practice and what Adam Smith called the "moral sentiments". As we argue in the following chapter, the sociology of punishment has tended to play down the significance of the moral and the symbolic in its analyses. Rather, it tends to see punishment and the penal system as instruments used by a superordinate, more powerful agency to control, repress and divide a subordinate, less powerful one. The reasons why it does this are complex but we try to analyse them. A note of caution is called for before we proceed further. Arguing for the revival of a certain diction in which punishment has been discussed, does not mean we have to throw overboard all that sociology has taught us. This work is intended as a contribution to sociology. Nor does it mean that we have to adopt a particular established vocabulary, whether that of Smith or of anyone else. Not only do there exist a number of sociological vocabularies that can be used - such as Durkheim's - but also it would be quite wrong to tear an eighteenth century way of looking at things out of its historical context and to suggest it has a direct explanatory relevance now. Rather, the contemplation of these older ways of theorising the issue works simply to remind us that more recent traditions can blind as well as enlighten.

It is perhaps ironic that it has taken an analysis of what at first sight looks like the least symbolic punishment - the fine - to raise this sort of problem. Nevertheless, I am aware that much of what follows does challenge the now established view. The justification of this, if one is needed, is not founded in any desire to cause a revolution, a paradigm shift, in the area. Such a momentous task is best left to others more capable and better equipped. Rather it is a case of:

Und ist der Ruf mal ruiniert,

So lebt man weiter ungeniert.

which roughly translated means:

If you can't make it by conformity,

Try dissent.

PAGE ONE

CHAPTER 1

Criminology, Punishment and MoneyPreamble

The purpose of this chapter is to consider a puzzle raised in the introduction. It was argued there exists a paradox in the contemporary sociology of punishment¹ ; the discipline explains the nature of punishment with little or no reference to the most commonly used of all sanctions, the fine. This is paradoxical because it seems to break, or ignore, existing canons of good practice. As was said, these canons take regular empirical occurrence to be a necessary, although not always a sufficient, criterion for establishing the importance of a phenomenon as being worthy of study. Statistical ubiquity also forms part of the criteria we use to assess the viability and strength of an explanation; the more empirically comprehensive an explanation is, the more we are likely to say it is a good one or at least one to be preferred² .

My ultimate aim is to reflect on the significance of this paradox. One rather global suggestion has already been made. It was proposed the paradox points to the existence of a general phenomenon called the cultural estrangement of punishment from money. By this we refer to a process which results in monetary sanctions being seen as unable to fulfil general cultural expectations of what punishment is really like. This is not because fines fail to cause pain, suffering or disadvantage to the guilty, but because there exists a cultural

resistance to recognising money as the appropriate commodity to deprive an individual of if punishment is to be done. Rather, the prevalent conception of punishment is closely tied to pain inflicted on the body and person of the offender, and the prison most clearly symbolises this.

This argument deserves fuller treatment which will follow in the next two chapters. My immediate objective is more confined. I want to discuss the effects of this estrangement on and within the contemporary sociology of punishment. This presumes two things. First, that the estrangement exists and, second, that the literature reflects it. And, as neither of these propositions have yet been fully substantiated it may seem presumptuous to begin this way. Moreover, what is the rationale of beginning a thesis on fines by studying a body of literature which I have claimed ignores them?

My answers to these queries are as follows. First, having made certain claims, I must now test them. This necessarily involves reviewing the literature in the contemporary sociology of punishment. Secondly, if on this basis, it can be shown that a paradox exists, it should allow a clearer idea to emerge of what the process of estrangement is like. This holds true only if the former is related to the latter, but this is the only reasonable conclusion to draw without falling-back onto irrational and untenable arguments such as the ignoring of the fine is to be explained by the presence of a mysterious amnesia amongst sociologists and criminologists. My third justification is, in beginning my study this way, I start at a point where the two master themes outlined in the introduction touch. A discussion of why the contemporary sociology of punishment is obsessed

with one vector of punishment ought to throw light on the nature of the other. In understanding the shape of the literature we will compare those objects which have been discussed to those which have not. This amounts to building conceptual bridges between the two vectors along which punishment has developed.

More specifically, I shall try to show (a) why the literature focuses mostly on the prison, (b) that this prison-centred literature has acted as a sort of conceptual lens filtering out concern with the fine, and (c) how, as a result, the fine has, at best, found only a marginal place in the conceptual vocabulary within which the contemporary literature discusses punishment. Although this must appear a mostly negative exercise, it can illuminate. It sheds light on the way in which the modern sociology of punishment conceives of its object of knowledge and on the vocabulary used to analyse it. It allows perception of the discipline as a particular way of talking about punishment and also to realise the limits of this. The lack of attention to the fine is one such limitation.

This can be put in different terms. My suggestion is that much can be gained by perceiving the contemporary sociology of punishment as a historically and culturally situated conceptual vocabulary. As such, it has built-in limitations; one of them being in Veblen's terms, a "trained incapacity" to think of fines and monetary sanctions as falling naturally within the scope of inquiry. Rather, the concepts used to discuss these sanctions make them marginal. Fines are discussed in the burgeoning literature associated with the "victim movement", but in a vocabulary centred on concepts like restitution or compensation³ - and these are seen as non or only quasi

penal. Again, the use of fines is discussed in the literature on white-collar crime, but only to show that their use is an index of the extent to which the powerful can place themselves beyond incrimination - beyond the full punitive effect of the criminal law. There thus exists an unspoken assumption that "proper punishment" consists of imprisonment, so we end up with the idea that the use of fines somehow equals non-punishment. Moreover, the almost complete lack of attention paid to the minor regulatory offences that we discuss in Chapter Four, is another example of this same tendency.

It is a desire to understand this trained incapacity that has prompted my attempt to trace the contours of the conceptual framework prevalent in the discipline. This requires me to apply to the contemporary sociology of punishment itself a framework of analysis it otherwise uses in its explanations of penal measures. It requires recognition that its explanatory agenda is subject to culturally embedded conceptual constraints. The old Burkean adage - that a way of seeing is also a way of not seeing - bites with particular force.

These, then, are the reasons justifying my apparently obtuse starting point. Before proceeding to a synoptic review of the literature, there is, however, one qualification to be made and subsequently borne in mind. My argument is not aimed at claiming that the singular concentration on the prison is either without foundation or completely misplaced. It would be difficult to imagine a description of the penal system that did not at some point consider the use of imprisonment. Rather, I wish simply to question the presumption that we can understand the system just from this vantage point. Once this is accepted, however, different sorts of questions

about the nature of the penal system and its historical development arise and vie for attention and one of them posed anew is the nature of the relationship between the use of the prison and other statistically more significant sanctions. Perhaps the key question to ask is not whether the prison is used a lot to deal with crime, but rather why it is used so little, yet has come to dominate our view of the nature of punishment in general. And, correspondingly, the question to ask about the fine is why is it used such a great deal yet hardly registers in our conception of punishment at all.

The Contemporary Sociology of Punishment: Themes and Purposes

Themes

The sociology of punishment is a relatively new discipline, in the sense that it has only been in the last decade or so that sociologists and criminologists have turned their attention to the issue of explaining the relationship between punishment and social structure. To be more exact, this is better understood as a revival of interest in a theme that had received considerable attention from at least one of the classical sociologists, Durkheim. Also, the preoccupations of the contemporary literature have to be placed in the context of their immediate intellectual environment. Apart from the sociologically inspired studies of prisons and prison culture, the predominant intellectual framework in which the penal system was studied was one couched in the terms of criminological positivism. In Britain and America between, say the 1940s and the late 1960s, the main concern was with the success and failures of treatment or "corrections". As I have argued elsewhere with David Garland (1983), this lent to "penology", as it was known, a very technical edge. The broader explanatory question of how and why different penal measures emerge tended not to be raised as criminologists sought after what they saw as far more pressing issues of practical import.

These matters of intellectual history are important because they help one to understand the nature of the issues with which the contemporary sociology of punishment is concerned. In part, the latter has to be understood as a reaction to what were seen as the narrow intellectual limits of penology. Instead of the questions of whether penal measure work, for instance, to reduce crime⁴, the

sociology of punishment has been preoccupied with a question posed in a "classical" sociological way - that of the relationship between types of social structure and types of penal measure. To be more precise, it has focused mainly on the question of the relationship between one type of social structure, capitalism, and one penal measure, the prison. For example, in his recent review of the contemporary literature, Stanley Cohen argues - while recognising the emergence of the prison as "only one of the complex pattern of changes ..." that occurred - that he nevertheless intends to concentrate on it, because the prison is "the paradigm for understanding the whole picture" (Cohen, 1985 p.15).

This concentration on the "birth of the prison"^S is the bed-rock of the discipline. It is seen as the key to unlocking the broader issue of the relationship between capitalism and its mode of punishment. The presumption seems to be that an explanation of why the prison has emerged will be the answer to the broader theme as well. Hence, even when the empirical focus moves beyond the prison, and attention, for instance, is given to methods of treatment, the concern with the prison is never far away. Foucault, for example, ties methods of treatment to the prison via the broader notion of "discipline". According to Foucault, disciplinary techniques - the "normalisation" of offenders by the training of their bodies - arose first in the prison and then became extended and diffused throughout the social fabric. But the prison is the hub of the "carceral archipelago", and methods of treatment can be seen as an extension of the basic power relationship crystallised in and by the prison (Foucault, 1978; Garland, 1985). Similarly, the analysis that Cohen

(1985) and Mathiesen (1983) give of what some see as the next revolution in penal practice - the development of hidden disciplining or of dispersed, disciplinary techniques - has a very similar explanatory structure. These new penal methods - exemplified by the decarceration movement (Scull, 1977), the emergence of community based sanctions (Cohen, 1985) and new technological devices of surveillance (Mathiesen, 1983) - are all explained in terms of the ever-increasing extension of prison type power relationships into the community. As Cohen himself has pointed out, the basic thesis that runs throughout the literature (with the possible exception of Foucault) describes the relationship between capitalism and punishment as being mimetic (Cohen, 1985 p.30). The prison is seen to mimic the nature of capitalist social relations, and other penal methods to mimic the prison. Hence, if the first of these can be understood, then it is assumed the secret of the whole must follow.

It would be quite wrong to create the impression that the contemporary sociology of punishment is a monolith. There exists a plurality of perspectives and explanations which give the discipline a welcome vitality and diversity. Three predominant styles of explanation however can be discerned. The first marks the pervasive influence of Marxism and the second the equally profound impact of Foucault. The third and less influential framework is traditional social history. The influence of the first two perspectives has been profound because - pace Foucault - they have been seen to provide both a general theory of society as well as a set of techniques with which to study it. The third only really offers a method. These three frameworks have been used in a rather eclectic fashion to mould

different accounts of the relationship between punishment and social structure, some of which stress traditional Marxist categories (Ignatieff, 1978; Melossi and Pavarini, 1981) while others make more use of Foucauldian ones (Garland, 1985; Cohen, 1985).

Nevertheless there are three important points of contact. First, as has been noted, the central organising question of all three frameworks focuses on the relationship between capitalism and its penal system. The point is to explain the uniqueness of the modern system. Second, the accounts are all explicitly historical; a developed historical consciousness pervades all of the most significant pieces of work. But, third, this consciousness takes a particular form. Penal history is portrayed as a series of dramatic changes and ruptures. To use Marxist categories, each mode of production is seen to have its own unique mode of punishment. An assumption of historical discontinuity is thus built into explanations. This has important consequences; for example, the treatment of the pre-capitalist or pre-modern system is primitive. Earlier systems of punishment are dealt with in excessively simplistic and over general terms; they are used simply as a broad point of comparison against which to show the presumed uniqueness of the modern. An example of this tendency is to be found in Foucault's work. We are asked to accept that the pre-capitalist penal system was based more or less solely on the use of physical punishments - capital sanctions, torture, whipping, branding and so on. As will be shown in chapter 3, this is an extremely misleading account. These methods were used but have to be placed in the wider context of a system that gave priority to non-violent means of settlement such as

penance; and, as we shall show, this was directly associated with the widespread use of monetary sanctions.

Much depends, of course, on starting points. Foucault begins his account with the rise of the absolute monarchies. Admittedly there is evidence to show an increase in the use of physical punishments in this period (Spierenburg 1985), but to take this as an accurate portrayal either of the system as a whole or of yet earlier practices is misleading.

The tendency to over-simplify is connected with this assumption of discontinuity. The past is seen as important only in as much as it is a yardstick against which to measure the present. This leads to the repetition of simple formulas that supposedly capture the essence and direction of penal change such as for example the purported move from the corporal to the carceral. Longer term continuity in penal practice is rarely considered and rarely studied. Yet as Spierenburg's (1985) recent book shows and as we shall endeavour to substantiate - continuities do exist and recognition of them can markedly affect our view of the nature of penal practice, including the presumed uniqueness of the modern defined as it is in the literature, in terms of the prison as the imminent feature of penal change.

The above sets out, rather schematically, what I take to be the explanatory agenda of the contemporary sociology of punishment. It also indicates the style of analysis found therein. I do not pretend it is an exhaustive account. It concentrates on only a few cardinal texts but, as with most disciplines, there are but a handful of central pieces which set the tone. And, as the sociology of

punishment is relatively new, the number is quite small. In many ways the concerns of the discipline are those established by the master-works of Foucault and Rusche and Kirchheimer, with a good dose of the spirit, rather than the substance, of such Marxist historians as E. P. Thompson and D. Hay (1975). There are other names with which to reckon, such as Rothman (1971, 1980), Ignatieff (1978), Scull (1977), Mathiesen (1983), Cohen (1985) and Garland (1985) but with the exception of the first, the work of the others can be seen as sometimes very splendid adaptations or extensions of themes raised in the master-works. This is not intended at all to disparage, but more to indicate lines of continuity and continuance.

There are a number of other works which ought to figure large but do not. Above all, the modern sociology of punishment lacks a sustained Durkheimian tradition (cf. Cotterrell, 1986 pp.27-28). Although there have been a number of publications (Garland, 1983; Spitzer, 1975) including the Lukes and Scull (1983) collection of his work in the area, these have not stimulated the production of substantial theoretical or empirical works which trace their genealogy to him. This is peculiar, because of all the "founding fathers" it is Durkheim who spends most time discussing punishment. Indeed, according to Durkheim, punishment belongs to those wider social forces of constraint that make the "social" possible. In this sense, punishment comes as close to being a sociological a priori as Durkheim would allow.

Given the proclivity of sociologists to argue from authority, to sustain analysis by the invocation of an authoritative figure, it is exceedingly odd that there are no modern Durkheimians in the area

(unless one wants, provocatively, to see Foucault in this light). The relative neglect of Durkheim cannot, I think, be explained just by contending that the content of his theory is wrong. As Spitzer and others have demonstrated, Durkheim seems to have got his penal history back to front; contrary to what he says repressive law appears to be a characteristic of modern organic societies, while restitutive law belongs to more primitive, mechanical ones. But sociologists generally manage to live with such errors in the other classics. Indeed in the case of Marx, there exists a major industry that attempts to shore up analogous failings. And, anyway, the classics remain relevant not just because of the truth or falsity of the propositional content of their theories, but because of the viability of the general explanatory framework they exemplify. There are no theorists who argue convincingly that this general aspect of Durkheim's work is irrelevant; that Durkheim can now be consigned just to the history of the discipline.

To understand the neglect of Durkheim's work we must therefore look elsewhere and doing this helps, as shall be shown, to highlight another feature of the contemporary sociology of punishment. My contention is that the significance of Durkheim's work is ignored because he uses a conceptual vocabulary that is in many ways at odds with the one predominant in the modern sociology of punishment. For Durkheim, the key to explaining the sociological significance of punishment and also changes in its content, lay in tracing its relationship to the collective conscience. He argues punishment functions to reinforce the moral and cultural norms that make collective social relationships possible. This leads Durkheim to

place, as Parsons (1949) notes, great emphasis on the symbolic; punishment is essentially a symbolic collective representation based in the passionate response of members of a group to those actions seen to threaten the sentiments they share. As is well known, according to Durkheim, these core aspects of sociability are invested with a particular importance - they are regarded as sacred. They have religious connotations, not just in the literal sense of being enshrined in theology, but also in the broader sense of appealing to the spiritual; to the presumed need for individuals continually to see there to be "something" which lies outwith and beyond them, but nevertheless also resonates in their everyday lives.

My point at this stage is not to contest this view but to note the style of analysis. Although Durkheim was conscious of historical change and differentiation, of the fact that punishment changes through time, there is a sense in which he tries to escape the relativising strictures that this has sometimes placed on sociological explanation. His aim was to capture the basic principles which underpin social organisation, one of which is the constraint that leads to integration. The individual is bound to the collective, not by the rational expression of will - but by transcendent forces which constitute the social as a thinkable category. There are problems of circularity and reductionism in this way of approaching matters but they do not concern us here. Rather, our concern is with the place which this scheme of things gives to history and historical knowledge. Although Durkheim was, as has been said, conscious of change, it does not form an epistemological category in his work. The contingent and changeable nature of the content of social life is fully recognised -

this theme runs throughout his work from the Division of Labour (1964) to Primitive Calssifications (1963) - but contingency and change are not treated as explanatory categories. Rather, history provides a method by which complexity can be stripped away so as to show the "essential traits" of social life. This is the method he uses in the Elementary Forms of Religious Life; aboriginal religion is studied because it provides a "simple" example of more complex religious belief; it offers, in microscopic form, evidence of the basic characteristics of all religions and it is these basic traits Durkheim seeks to identify⁷ (Durkheim 1976, pp.1-20).

Durkheim formulated a type of explanation in which the contingent and the necessary are brought together in order to construct a positive science of the social. This contrasts with the type of explanation used in the contemporary sociology of punishment. Here, as we saw, there is a presumption of discontinuity: contingency and change form an epistemological category; this is one reason these explanations pay so much attention to exploring the history of their subject-matter.

There is, however, another, and more significant, contrast to be drawn between the conceptual vocabulary Durkheim uses and that in the contemporary sociology of punishment. As was said, for Durkheim the key to understanding punishment lies in tracing its moral and symbolic resonances, it is the relationship to the 'moral sentiments' that are given priority. With the notable exception of Ignatieff's auto-critique (Ignatieff 1981, p.153ff), this line of exploration is more or less absent from the contemporary sociology of punishment. This does not mean there is no mention whatsoever of morality and symbols -

it would be difficult to escape using these terms altogether - but that such concepts are given at best a marginal explanatory status. The concept that occupies centre stage in these accounts is power. As Ignatieff puts it, the literature contains "three basic misconceptions: that the state enjoys a monopoly over punitive regulation of behaviour in society, that its moral authority and practical power are the binding sources of social order, and that all social relations can be described in the language of subordination" (Ignatieff 1981, pp.156-157. See also Young, 1983).

The last of these three inter-related "misconceptions" is, perhaps the basic one. Ignatieff's point is that the modern sociology of punishment presumes the language of punishment is primarily, if not only, a language of power and that punishment is most adequately described as a repressive act. Moreover, he argues it is also presumed that there must be some "agent" who wields this power, either as an end in itself or as a means to a wider one, such as the maintenance of ruling class hegemony.

Shortly we will investigate why these presumptions are made; why the sociology of punishment assumes this to be the best way to describe its subject-matter. But, the contrast with the Durkheimian scheme ought, already, to be clear. Durkheim's conceptual vocabulary is seen to be out of tune, because he is generally regarded as either having misunderstood the nature of power or of paying insufficient attention to it. There is only one place where he directly links power to punishment - in the Two Laws of Penal Evolution (1983) - and this is in the context of a description of a forced, pathological division of labour. Durkheim argues that punishment generally becomes

less severe over time, with the exception of the development of "absolute power", where there is a return to a quasi-mechanical division of labour. Clearly, Durkheim evolved this notion of absolute power to account for the increase in the severity of physical punishments, the blood sanctions, during the absolute monarchies, particularly in France (remember this is where Foucault begins his story). For Durkheim, absolute power indicated a forced, as opposed to a spontaneous, division of labour, and is 'non-natural' in the sense that it constituted a period of reversal or aberration in the otherwise naturally developing order of history.

Of course, much can be criticised here, but our point is that, for Durkheim, power and punishment are only directly linked in exceptional circumstances. There is no need to tie them together when explaining the state of "normal" social arrangements, power is not essential to the explanation of punishment. Such a framework simply lacks appeal to those who begin from the presumption that power is the key to understanding.

My point in exploring this comparison is neither to resuscitate Durkheim unalloyed nor to suggest that there exist two mutually incompatible conceptual vocabularies which we have to choose between. Rather, it is to note their existence and to observe that the current predominance of one in the contemporary literature has led to the other being largely overlooked. Durkheim's work is not the only example which could be used to make the same general point. The now rather forgotten essay of George Herbert Mead, "The Psychology of Punitive Justice" argues a very similar case. For Mead, punishment is based in the hostile, defensive passions which govern how penal

institutions work and places limits on the success of attempts aimed at change or reform. As he puts it, "it is quite impossible psychologically to hate the sin and love the sinner" (Mead 1964, p.597). Again as Ignatieff points out, Adam Smith's analysis of punishment is carried out with little direct reference to the concepts of power or the state. Rather, punishment is analysed in terms of the "moral sentiments", the "dispassionate observer" and dissemination of the "sympathy" which Smith took to be the basis of all social relationships. And to go beyond Ignatieff, it is surely worth remembering that Smith, crudely understood as the founder of laissez-faire economics, sub-entitled his most famous work, The Wealth of Nations, where this doctrine is purportedly set forth, an essay in "States Craft". In other words, in those situations where, to the modern way of looking at things, the state is assumed to be central - the institutions of criminal law and punishment, no great mention is made of them, yet by comparison in the sphere of laissez-faire economics where the state is presumed to be absent, the term is explicitly used.

In the next chapter we will explore the relationship between these two vocabularies further. Here, the comparison has helped bring out an important characteristic of the modern discipline - the central place it gives to power in explaining punishment. This characteristic also accounts for another feature of the contemporary literature mentioned in the introduction, what we called its instrumentalism. The contemporary sociology of punishment portrays penal institutions as "instruments of power" used by a superordinate agency to repress a less powerful, subordinate one. The prison, for example, is variously

analysed as a class or state tool or as a modality of power in its own right. "Agents" are seen to use punishment to achieve ends which lie outwith and beyond it. The criminal law, the prison, as we noted earlier, are perceived to shore up the hegemony and force of the ruling class. Or in Foucault's work, the prison disciplines offenders in order to turn them out as cogs in a capitalist machine, as well as reproducing an underclass of miscreants by continually failing to achieve its official objectives. In all cases and circumstances, the prison, methods of treatment, the criminal court, the complete penal apparatus, has a direct, instrumental function understood in terms of the dynamics of power.³

At this point we need to ask two sets of questions: (a) what has all this to do with the ignoring of the fine? Of what relevance is our analysis of the contemporary literature to the existence of the paradox within it?, and (b) why does the literature analyse punishment in this uni-dimensional way? Why is it so concerned with power?

The issue which lies behind the first set of questions is this. One could accept the analysis of the literature given above but observe that there is no reason why it should not be applied to the study of the fine. There are not immediately obvious reasons why the focus on power, the characteristic instrumentalism, ought to rule out concern with it. Indeed, if we are reminded of what lies behind Hermann Mannheim's characterisation of the fine - its lack of sensation and romance, its routine, instrumental nature - there exist good grounds for anticipating that the literature ought to take the fine very seriously indeed. But it does not and this is why the paradox exists.

It would be tempting now to rest our case by re-introducing the idea of estrangement. As there appears to be nothing in the framework of the contemporary sociology of punishment that in principle accounts for the lack of attention paid to the fine, we could point to the idea of estrangement and claim it explains all. We could say that the discipline gives no place to the fine on its explanatory agenda because it accepts the end product of the estrangement - the dissociation of money from punishment. But to rest here would be only to tell half of the story. As we set it out, the paradox is composed of two elements; one is the ignoring of the fine but the other is the central place given to the prison. While I think it has been shown that the contemporary literature does take the prison as the object to be explained, no case has been argued for why this should be.

The answer to this brings into focus the second set of questions outlined above, those asking why the contemporary literature is so concerned with power. My suggestion is the concentration on the prison is to be explained, in part, by the central place given to power. The connection between the prison and power is forged at two levels. First, in a society such as ours, whose master-theory of political obligation is liberalism, there is a 'natural' link between power and the deprivation of liberty. By this I mean there is a (modern) tendency to think of power always in terms of it as a force which sets limits on what people do. Foucault's theory of power endeavours to go beyond this conception by highlighting its positive, creative aspects as well as the negative ones recorded above, but the fact that he sees this as an extension of the conventional view is evidence of the extent to which the latter has monopolised modern

political theory. The idea of legitimate political power as "negative liberty" (cf. Berlin 1969, Skinner 1984, Pocock 1986) gives to the prison, and theories of punishment generally, a central place. The description and justification of the conditions under which that most valuable of all commodities, liberty, can be deprived occupies a pivotal role in political theory. There is an apparent natural connection between power - liberty - and the prison, quite simply because the study of the prison can tell us much about the nature of political power itself.

With the exception of Foucault this connection between power and punishment is rendered in the literature as one between the state and penal sanctions, particularly the prison but also, as we argued earlier, those other disposals seen to mimic the type of power relationship the prison represents. The state, as Ignatieff noted (1981), is seen to monopolise the power to punish. Some theorists have made great play on this, in the sense they see the study of punishment as providing a very special vantage point from which to launch an analysis of the state and power generally. As Cohen (1985, p.15) puts it, the histories of punishment he reviews are "a history of Leviathan itself rather than a simple history of prison reform".

This may be seen to rather overstate its case, but it is representative of a view that permeates much of the contemporary literature. As indicated, Foucault's work is a major exception to this trend, but only to the extent his more complex theory of power challenges the assumption that agents - be they individuals or collectives - can "own" power. For him power is a force in its own right. It is its own agent and occupies the same conceptual position

that the notion of the economy does within marxism - it is the prime mover. Foucault's work thus does not dissolve the conceptual linkage between power, punishment and the prison, but rather displaces the state or any agent from centre stage.

The emphasis on power and its connection with the prison may seem overblown in its more ambitious theoretical claims, but that the link is made seems reasonable. The prison is about deprivation of liberty; in western societies the right to liberty is as close to an absolute as any right can be, liberty is at the core of much modern political theory, so to make the link between power and the prison is understandable. With this as the broad conceptual backdrop, one can see why the prison is given priority. To be very direct, there simply appears to be almost endless theoretical mileage in studying the prison. It is the criminologist's equivalent to the philosopher's stone, promising to turn base metal into gold.

If this constitutes a theoretical rationale justifying the focus on the prison there exists another important dimension to explore. The second level at which the link between power and the prison is forged has more to do with the practical, political purposes that underpin much of the contemporary sociology of punishment. Although, as was said, the modern discipline endeavoured to break out of the narrow "correctional box" it saw traditional penology as being confined within, it would be quite mistaken to believe that all concern with the practical and the political was in consequence dissolved. On the contrary, the modern sociology of punishment is deeply concerned with the practical, political implications of its subject-matter and this is directly relevant to understanding the

roots of its obsession with power and the prison.

In contrast to traditional penology, the modern sociology of punishment has evinced a significantly different conception of the political. As well as the broadening of the theoretical quest we have looked at, there was an accompanying expansion in the range of political questions asked. If traditional penology can be seen as working within an assumed consensus between academics and policy-makers, the modern sociology of punishment can be seen to have challenged this and to manifest a basically hostile attitude towards the use of power, and towards policy-makers and administrators. This is a somewhat simplified rendition of what has happened but the details of the story are well known and are told elsewhere (Cohen 1974, Garland and Young 1983). It does, however, convey a sense of the changes that are perceived to have taken place. The fundamental attitude of many of those who work within the modern sociology of punishment can be summarised thus - beware of power, distrust those who hold it, resist its exercise, attack its institutions.

An appreciation of this "radical" stance is quite fundamental to understanding the texture and scope of the modern discipline. To borrow a phrase from Frederick Jamieson (1981), the modern sociology of punishment exhibits a "political unconscious" which markedly affects its form and content. The questions posed, the structure of the explanatory agenda, reflect the political desires which are sometimes pushed underground and at other times are clear for all to see. Rothman's second book, Conscience and Convenience (1980) is an excellent example of the reciprocal relationship between political purpose and concrete inquiry. As Cohen notes (1985), Rothman clearly

intends "lessons" and "examples" to be drawn from the way in which the good intentions of reformers were first accommodated and then blunted by the penal bureaucracy and the experts. Similar themes are explored, with the same intention, in Scull's work (1977, 1979, 1983) and perhaps most explicitly of all in Foucault's and Cohen's.

Viewed in this way, the modern sociology of punishment can be understood as a muted, and somewhat under-developed sociology of power. The aim is to come to terms with the perceived contradictions of power by both evolving a theoretical framework for studying it and by laying the foundation of a politics that can resist it. Indeed, one probable reason why Foucault's work has had such an immense influence on the discipline is because it deals explicitly, almost relentlessly, with punishment in this way. His work is an extended reflection on the nature of power and how its exercise can be resisted. This perhaps accounts for the reaction of some of his followers to criticisms claiming Foucault's history is partial or wrong. They say, such criticisms are beside the point precisely because Discipline and Punish is not really a history of the prison, but more a history and theory of power (see, for example, Cousins and Hussain (1984), or for a critical view, Garland (1986)).

If the sociology of punishment is interpreted as a sociology of power, the concentration on the prison and the power relationships it represents becomes understandable. As the prison is about the exercise of power in a very dramatic way it is entirely comprehensible that it should be studied. And as other sanctions such as methods of treatment or community sanctions are seen, as we said, to mimic the prison in important ways, it is also understandable why they too have

been analysed in a similar way. Although due recognition is often given to the fact that the reformers who called for and developed these sanctions saw them as alternatives to the prison, there is a tendency to play down the implications of this for analysis. Rather, these sanctions are analysed within the same instrumentalist framework, conceived in terms of power. Treatment is portrayed as another way of achieving the same end - the repression and control of a subordinate population by a state captured by the ruling class. Once this framework is applied, then one can appreciate what allows theorists, such as Cohen, to claim that "the prison is the paradigm⁹ for understanding the whole picture" (Cohen 1985, p.15).

The above is not an exhaustive account either of the modern literature or of the reasons why it exhibits the paradox by concentrating on the prison and ignoring the fine. But it does capture what arguably have been the main trends. To fully understand the structure of the explanatory agenda, we would need both to probe more deeply and be more prosaic. One such deeper issue surrounds the significance of the body as a theme in much modern literature of all types. As Foucault (again) has argued, one can understand the emergence of what he calls "governmentality" - the institutions of governance understood in the broadest of ways - in the modern world in terms of their increasing control over the body and populations. Techniques have developed which endeavour to control the body, by division and classification into different populations and by discipline - what Foucault calls the realm of bio-politics. This touches on a theme central to this inquiry but which cannot be gone

into in depth at this point. However if we accept what Foucault says, then it is but a small conceptual leap to see the concentration on the prison as being tied up with the central place which control of the body now has in modern social life. Furthermore, we would also have to extend a point made in passing earlier. A full discussion of the significance of the prison and why it has such hold on the literature would necessitate an analysis of the emergence of the idea of liberty as an almost inalienable right which individuals surrender, only where they offend the corresponding right of others. More particularly we would need to explore the relationship between concepts of individual liberty and the idea of personhood and the autonomy of the self. The former constitutes an essential part of the conceptual vocabulary we use to describe the latter; we perceive "individuality" partly in terms of the possession of liberty. Moreover, this ties in with the Foucauldian argument concerning bio-politics. There is a connection to be made between the body, its investment with liberty and the perception of self. This connection can be seen in demands or claims that individuals ought to control their own body as in the debate on abortion or more generally within feminism (although it is not confined just to those areas). As Mauss (1938, 1985) brilliantly argued many years ago, this conceptual apparatus is both culturally and historically contingent. Consequently, it ought to form part of the explanation both of how and why the prison emerged and of why it now holds centre stage in the contemporary sociology of punishment.

These broader, deeper issues are necessarily raised by the topic we discuss, but they go beyond the literature itself. With the exception of Foucault's own work, they are occasionally alluded to (as

in Cohen, 1985) but have yet, understandably, to be fully explored.

On a more prosaic level, our account of why the literature discusses punishment in a vocabulary of power and centres on the prison, would have to consider in more detail the specific social contexts out of which the literature has emerged before it would be considered a full one. For example, it needs to be pointed out that there is a spectrum of political views within the discipline. Rothman's work is more "liberal" in tone compared to the anarchism of Cohen or Foucault, or the more orthodox Marxism of Melossi and Pavarini. As this influences the texture of explanation, it is important at least to record it.

There are other reasons why the sociology of punishment concentrates on the prison. The institutional nexus within which the discipline of criminology is practised (see Cohen, 1972; Garland and Young, 1983), affects the issue in ways we have not yet explained. It is important to note that the main thrust of public policy since the early nineteenth century has centred upon the prison, methods of treatment and upon what are regarded as serious crimes. By contrast, there has been little policy interest shown in the fine or other monetary sanctions or the offences for which they are used. One important practical result of this is there is little "primary evidence" in the form of blue books or government reports to study. This is evidenced in the publication of the massive Radzinowicz and Hood volume on The Emergence of Penal Policy (1986). Based in an exhaustive study of the primary sources, this book devotes only four pages to the fine, although part of their general thesis is that previous histories have exaggerated, as a matter of historical fact,

the actual significance of the prison in nineteenth century penal policy. Given the methods these authors use one can conclude the brevity of the entry on the fine is related to the scarcity of primary sources. Recently, fines and other monetary sanctions have become more topical, but only due either to the problems the fine creates for the wider penal system - the imprisonment of fine defaulters - or, as we pointed out earlier, as part of the wider "victim-movement", and then the interest is not in fines but in compensation. This has not resulted in studies of the fine itself, because it is not the fine that is really being discussed.

Again, the focus on the prison is due to the restricted historical range of much of the work in the sociology of punishment. As most explanations begin only with the "birth of the prison", earlier practices in which money played a central role, are not really brought into the story. Earlier penal practices are considered, as we have said, just as a backcloth to the emergence of the modern system and not as topics in their own right. Moreover, in those rare instances (Foucault, Spierenburg) when attention has been paid to the earlier practices it has been highly selective and focused on the "blood sanctions" such as transportation, whipping, capital sentences and related bodily punishments. This is to study just one vector along which punishment has worked. The other vector which I claim it is essential to analyse if a balanced picture is to emerge - punishment as the exchange or deprivation of resources - is conceptualised in a vocabulary that places it outwith the terms of debate. Practices lying along this other vector are conceived in terms which make them belong more to the private law of delict and

contract than to the law dealing with crime. (Again, the term compensation is a favourite.) Of course, the meaning of concepts changes; punishment ~~now~~ means something different ^{now} than it once did. But this does not justify either the ignoring of earlier practices or the reconceiving of them in modern terms. Rather, it means we must study how and why meanings have changed. Beginning inquiry with modern conceptions and then pushing them back into history is not only unhelpful, it is wrong. It limits analysis, it means the inquiry works with a conceptual framework that selects only that evidence which is relevant to modern conceptions and places other evidence beyond gaze.

But is it a Paradox?

Let us now return full circle to the Martian. Have we said enough to explain to him our way of explaining punishment? In one sense we probably have. We have explained to him why we conceive of punishment in terms of the prison and why the literature reproduces this. Essentially we have been describing the rules by which we come to recognise a certain institution, the prison, as the exemplar of punishment. Contained in this is an implicit invitation for him to "go native" or at least to be enough of an anthropologist to empathise with our cultural norms and practices. But would this be enough? Does the invitation to go "culturally relative" discharge the burden?¹⁰ Does it show that what has been described as a paradox is not really a paradox at all or that it can safely be ignored?

It seems to me the Martian could respond in several ways. He could say, yes, "I understand your native practices, your norms and

values, I even applaud your politics, but you asked me to survey your penal system and, according to rules of reasoning, which you claim to be important, I have delivered an accurate report. Why, therefore, do you resist my description of your system of punishment as one characterised by the taking away of money? Surely the paradox you experience is real and cannot be wished away?" Is there much to say in reply to this obdurate Martian that would shore up the literature as it now stands?

There are several answers, some more reasonable than others, but all, it is suggested, ultimately fail. One response would be to say that fines are not "really punishments". Several things could be meant by this. The strongest meaning would be the literal one - that fines are not "punishments" but are better classed under some other general heading such as "regulations". Indeed, one can discern an analogous case in the literature; fines levied on traffic and other minor offences are often called regulatory or characterised as post-hoc licences. Again, as we saw in the literature on white-collar crime, there exists a certain line of argument which sees the use of fines as evidence that the powerful place themselves beyond incrimination, beyond true punishment. The literal argument can be strengthened. To the above, can be added the following - it could be pointed out that "punishment criteria" are not the only ones used in the penal system, for example, in sentencing. Other criteria, such as those of individualised treatment, consideration of mercy, pure expediency, and compensation are all used as well; so it is quite unnecessary to characterise all disposals as punishments. What we need, it could be said, is a more subtle and discriminating framework

to encapsulate the differing principles in use. This fuller, broader account would presumably use some generic term or concept like social control and then differentiate between the various types of classes of disposal according to the criteria consistent with the generic concept. Alternatively, each sanction could be examined in detail in order to establish its characteristics, its particular type of rationality (a Foucauldian tactic) and then be related to some all encompassing notion. Which ever course is chosen the important analytical and empirical point is that there is no sociological reason to characterise the penal system by one undifferentiated single term.

The Martian could find much to agree with in this argument. But he would be wise to say also that it is one which has yet to be made out in a consistent fashion in the literature. Also, he might want to examine more closely what is being argued and wish to point out some of the consequences that seem to follow.

For example, the claim that fines are not punishments could mean either that, in a formal definitional sense, they lack the attributes necessary to qualify as punishments or it could have a lesser, commonsense meaning - people do not regard fines as punishments because of their association with the minor, less serious offences. There is also a third meaning that cuts across the other two. It could be argued that because fines do not harm the individual in the same way as imprisonment does, they are not a punishment. The issue here need not be restricted just to the degree of pain caused but to the type of pain. It could be argued that for an act to be a punishment it must inflict harm on the person's body or character.

These are different but related arguments. The first is actually the least interesting or controversial, although it does give rise to some important points. If we take - and allow our Martian now to see - a standard, accepted definition of punishment, such as Hart's, we and he would conclude that the fine meets all its requirements. According to Hart (1968, pp.4-5), there are five elements or characteristics of punishment:

- (i) it must involve pain or other consequence normally considered unpleasant;
- (ii) it must be for an offence against legal rules;
- (iii) it must be of an actual or supposed offender for this offence;
- (iv) it must be intentionally administered by human beings other than the offender; and
- (v) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

The fine ^emeets all these requirements. It is painful and can only be used in the penal system subject to the conditions described by points (ii) - (iv). Indeed, its use in "private" institutions, for example, University Library fines, meets these conditions as well. (The University is the legal authority, its rules, voluntarily entered into by individuals equal legal rules, etc.)

So in the formal definitional sense, fines are punishments. Methods of treatment, however judged by this definition, are not.

Treatment need not involve the infliction of pain; its use does not require the "client" to have breached legal rules as the operation of the Scottish Children's Hearings System shows.

What sense can be made of this conclusion? If fines are punishments, it is difficult to see why any other term should be used to describe them. This shifts the burden of the argument back onto those who would wish to use some other term, like regulation, to describe fines. Not only are regulations different from punishments (see Finnis, 1972), but it is of importance to recognise that sentencers do regard fines in this way. In Chapter 6, we describe how sentencers justify their use of the fine in the classical vocabulary associated with the description of punishment - retribution and deterrence. We should not lose sight of this point. The perception actors have of their practices is an essential part of any explanation of them. While we may not wish to restrict accounts just to this level, it cannot be ignored.

The meaning of the claim that fines are not punishments must therefore refer to the other senses of it outlined above. In reflecting on these, it is clear that the type of argument involved is very different from the formal definitional one just encountered. Both the second and third meanings of the claim refer to a wider cultural perception of the nature of punishment and also of crime. In both cases, the claim is that the fine does not meet our cultural expectation of what punishment is like. First, because of its presumed association with the less serious offences, second because of the sort of pain it delivers. At this stage of my argument it is not important to dispute the validity of these propositions, except to say

that the first greatly underestimates the use of fines in "serious crimes" (see Chapter 4 and Bottoms, 1983). What is important to note is that once the argument shifts to the cultural perception of the nature of punishment it touches on a theme central to this study. Both the senses of the claim that fines are not punishment now being discussed are examples of the cultural estrangement of punishment from money. They are instances of the cultural resistance that exists to bring punishment and money together.

There are other arguments that could be made in response to the Martian. Again, they take the form of partial defences of the existing literature and therefore of the wider cultural perception of punishment on which it is based. Some criminologists may respond that, as it is only recently the fine has become so popular, the discipline has not yet had time, as it were, to catch up. Others may say that as the prison carries so well the burden of the modern idea of punishment, there is no reason to look at other sanctions, especially the fine.

The first of these responses is most unsatisfactory. It is wrong empirically. As we show in Chapters 4 and 5, the fine and other monetary disposals have always been the most frequently used sanctions. For a relatively short period in the late eighteenth and early nineteenth centuries their use was limited in serious crimes, indeed it was displaced by the prison, but if this is compared with what happened before and after, it can be seen as an interruption in a long-term historical process. Also, it must be retorted, it is not as if criminology has really used firm empirical data to ground its

historical and contemporary explanation of the penal system.

Although criminology is often castigated and derided for its empiricism, it has not based its explanations on the most obvious of empirical sources - the officially published statistics describing patterns in the use of sanctions. Although there are well known limitations with this source of data it is easily available. In Scotland, for example, statistics describing the use of sanctions in all crime and offences and for all procedures, are available from 1897. Before that the material is scanty, but primary sources do exist. The most recent general account of the penal system, Cohen's, (1985) repeats this peculiar position. Not only is his study based on weak evidence (see Young, 1986), but he appears to put to one side this sort of statistical evidence. He argues the "most visible and open" source of data is the "actual stories and words used by the people who run the control system" (p.10). Although we use this source of data too later on, it is strange to see it described in this way. It is hardly "open" or "visible" and ^{an} interpretation is fraught with deep methodological difficulties.

It is not ridiculous to suggest that if criminologists had used this most easily available of sources as the basis of their work, then a very different picture of the penal system may have already been produced. In particular, the position and significance of the prison for our understanding of the penal system may already be quite different. As it stands, the at best highly selective use of this data is most unsatisfactory.

The last response brings together and summarises an important counter argument. So far the Martian's case rests on a particular

version of how sociological explanation works. The Martian reminds us that empirical regularity is normally taken to be the basis on which sociologists characterise systems (and in that sense explain them). While it cannot be denied this is arguably the method of sociological explanation it would be wrong to suggest it is the only one. There exists another important version of explanation, that although not mutually exclusive to the Martian's, does stress different methodological protocols. This other method works by constructing what we may call "focal meanings" or ideal types. This is a mode of explanation that runs, as Finnis (1983) points out, from Aristotle through to Weber. It differs from the Martian's explanation as it contends the important thing to do in explaining social phenomena is to capture their cultural meaning by constructing their pure or standard case. This need have nothing directly to do with how often a particular phenomenon occurs, although one would expect there to be some relationship between regularity of occurrence and significance of meaning. Hence, if we wish to explain "law", Finnis argues, we need not go about this by noting every instance in which the thing called law is used. Rather, as Hart and others do, we elaborate the focal meaning and then compare each usage to it. As a result, there will be some circumstances which fully meet the focal meaning and others which shade into it.

Now with a certain generosity of spirit, we could argue that this is what is happening in the modern sociology of punishment. That theorists intend the prison to be the focal meaning of modern punishment because it most completely carries forward and clarifies its meaning. The attention paid to the prison thus is justified and

the Martian is not so much mistaken in his objections but rather too narrow. This is a strong argument, not easily put to one side. However, does it defeat the Martian?

It certainly does not in the form it is put above. Even if it is accepted that the prison constitutes the focal meaning of modern punishment, this does not justify the lack of attention paid to the fine. The first part of the argument cannot be used in support of the second. Also, the Martian may well ask how we construct this focal meaning without recourse to some notion of statistical regularity at some point. But, most important, the Martian can accept this argument although it may lead to some qualification in his own. The Martian could concede that prison does constitute the focal meaning of punishment, but still require the sociologist to come to terms with the significance the fine has because of its preponderant usage. This appears to be an eminently reasonable position. It suggests the resulting explanation will be much more complex, but this is hardly an objection.

If the sociologist accepts this, then significant changes follow. The sociologist will be forced to rethink the nature of the relationship between the prison and other sanctions, particularly the fine. At the risk of being pre-emptive, the sociologists may well have to reconceptualise the prison as being primarily of symbolic importance. There is a potential in the existing literature for just this sort of theorising and analysis but it is one which is woefully underdeveloped. Once this point is reached, however, the texture of explanation alters. To put it crudely, the instrumentalism of the explanations will become played down and symbolism played up; the

conceptual scheme associated with Durkheim although not restricted just to him comes into focus. A different sort of conceptual vocabulary becomes necessary. One that is able to incorporate the analysis of symbols and indeed of myth. Such a vocabulary has yet to be developed in this area. For some, Foucault would no doubt point the way. Whatever the direction followed, the established conventional picture is challenged; new questions emerge to be asked and answered. We could no longer be content either with an analysis couched just in terms of discourses or one couched only in terms of practices. The relationship between the two becomes crucial and needs to be faced.

Conclusion

This Chapter has endeavoured to show that the study of the fine raises serious questions for our present understanding of the penal system and how we go about explaining it. The problems posed for the existing sociological literature by the appearance of the Martian cannot be wished or explained away. Rather his appearance, troubling as it may be, should make sociologists and criminologists think again.

The existing sociological literature on punishment exhibits, so it is claimed, a paradox. It attempts to account for the nature of penal practice with no, or at best very little, attention being paid to the most commonly used of penal sanctions, the fine. Because of this, the literature itself, it has been argued, provides evidence for the existence of the cultural estrangement of punishment from money. That it does this is the justification for the long review of it undertaken. It is through acknowledging the existence of this

estrangement that we have been able to account for the paradox in the literature.

The Chapter suggests also the need to come to terms with the limitations of a certain style of thinking about punishment; one which is characterised by the conception of it in terms of power and as an instrument. This style, deeply embedded as it is in contemporary sociology, fails, so we argue, to convince. Most significantly, it underestimates the importance of symbolism; of punishment as a symbolic social act that cannot be reduced, analytically, to a means ends relationship.

What we must do next is to say more about the nature of the process by which punishment has become estranged from money. Not only is this a key to understanding the structure of the modern penal system of its history, and the place of the fine and the prison in it, but also in describing it, we shall begin to lay down the elements of an alternative conceptual framework.

The Cultural Estrangement of Punishment and Money

The purpose of this chapter is to discuss the cultural estrangement of punishment and money, first by being more precise about its meaning, secondly, by outlining its function in the criminal justice system and thirdly by examining its relationship to the fine. The first of these objectives is achieved by analysing an example where estrangement is particularly clear; this is of the use and non use of fines in cases of rape. A number of other themes and sub plots are explored as well; in particular, I develop further my argument concerning the need for a conceptual vocabulary sensitive to the relationship between punishment and the moral sentiments.

The meaning and nature of estrangement

At the risk of prolixity, I begin by summarising what has been said so far about the estrangement of punishment and money. The term refers to a process in which money is perceived as being unable to fulfil general cultural expectations of the nature of punishment. To argue this in a slightly different and more precise way, I argue money is seen as inappropriate for dealing with certain types of criminal harms and this is clearest only in certain circumstances. These are where a serious crime is involved and the legitimacy of the criminal justice system is in question. However, estrangement does have broader, but less potent, effects on the criminal justice system as a whole. For example, the scale of values used to assess the seriousness of punishment and crime is

organised partly around the idea that fines are not "proper" punishments. While the relationship between this scale and the day-to-day operation of the criminal justice system is complex (see part two), it does form the backdrop to sentencing practice and thus has an influence on the use of disposals generally.

Portrayed this way, the process of estrangement is essentially a cultural phenomenon. It is tied up with the way punishment and money are viewed and harm evaluated. At its heart lies a complex process of moral and symbolic evaluation. Although these evaluations take place inside institutions and structures, it would be a mistake, I suggest, to try and understand them as the simple consequences of power and ideology. Neither the actors who make these evaluations, nor the cultures they draw from, should be regarded as the passive effects, mere tracers, of overbearing structural forces. What follows, is not an exercise in the unmasking or deconstructing of ideologies. There is no hidden truth, strategy or purpose which I seek to lay bare. Rather what I intend to do is to unravel the complex processes involved in estrangement, and to describe them and their relationships to one another. Once this is done it will then be possible to return and consider the questions of how the process of estrangement is related to institutions and what its wider social functions are.

Punishment, Money and Rape

That the fine is generally seen as an inappropriate punishment for rape is clear. Although in Scots and English criminal law the fine can, theoretically be used, there exist well known and entrenched sentencing practices in both jurisdictions which make this a near impossibility. A



sentencer who used the fine to "punish" a rapist would risk being perceived as incompetent. The public and judicial furor that follows the very rare use of fines in these cases shows both how deeply this sentencing practice is embedded and how closely it resonates with public opinion. For example, the infamous, unreported, English case of R v Allen (January 1982), in which a judge fined a man for raping a hitch-hiker confirms these points. In the media coverage that followed public recognition of what had happened, the judge was pilloried. Indeed, questions were asked in the House, this in turn, causing the Lord Chief Justice, Lord Lane, to comment. As a result of this case and others in which inappropriately "light" sentences had been seen to be given (not all fines), Lord Lane issued sentencing guidelines which declared the normal punishment for rape to be a lengthy prison sentence. (The Scottish "practice" is the same: for a description see Nicholson (1985 pp 52-53 for comments on Conlon V. H.M.A., 1982, S.C.C.R. 141; Allen V. H.M.A. 1983, S.C.C.R. 182 and Barbour V. H.M.A., 1982, S.C.C.R. 195.)

Now why should this be the case? Why do these sentencing practices exist which make the fine for all practicable purposes an entirely inappropriate punishment for rape, although, as has been said, it is a theoretical possibility?

One answer would be that the fine is not used because to do so would upset the scale of values implicit in the system by which the seriousness of crime and punishment are assessed. This scale can be broadly characterised thus: For crimes which harm the body or person of the victim the appropriate sanction is one which, within strictly defined legal limits, does the same in return. As the prison comes closest in the British legal systems to doing this, it is seen as the appropriate

sanction. For those wrongful actions which are not perceived to harm the body or person of the victim, other less serious punishments can be brought into play. Quite clearly, within current conceptions the fine exists near the bottom end of this scale. Other considerations, of course, affect the scale, such as conceptions of what is mala in se as contrasted to mala prohibita, as do notions of dangerousness and public safety. One reason rapists and other "dangerous" criminals are "locked up" is because they are seen to pose a threat to the public. (On this see Bottoms (1977): he characterises the structure as a "bifurcated" one; prison for the dangerous offender, fines and other lenient sanctions for ordinary ones; treatment considerations can be significant as well.)

As sentences^s are required to make their decisions in terms of this scale of values all seems to fall neatly into place. The fine is inappropriate in cases of rape because it belongs to the wrong end of this spectrum. To be plain about it, the fine is perceived to be inappropriate because it does not deliver an adequate quantum of pain. Ideas of proportionality are quite central to sentencing practice; a serious harm, intentionally inflicted on the innocent has to be met with an equivalent one equally intentionally inflicted. If any of these considerations are upset, the scale of values is compromised and the legitimacy both of the actor who caused the upset and of the system as a whole is potentially threatened.

But we cannot leave the issue here. The scale of values is not a neutral mechanical device. It is not simply about the degree of harm and pain caused to victims and offenders but also about the type. If it were just about the former then there is no convincing reason why fines should not be used in rape cases or, at the other extreme, why motoring offenders,

for parking offences should not be imprisoned for short periods. The levying of a very large fine can cause considerable pain to the offender. Depriving an individual of money - a commodity seen as essential in our society - can be extremely damaging. It limits choice, it restricts social intercourse and social interaction. While it does not literally "lock someone away", the fine, if large enough, can cause destitution and penury and thereby restrict the effective exercise of liberty. But I suggest even if the rapist were fined his total income for ten years, it would still be perceived as an inappropriate sanction; why?

The answer I propose is because the fine is seen to be the wrong sort of pain and suffering for the type of harm rape is regarded to be. It seems wrong to deal with a crime which so devastates the victim by a commodity like money. It appears morally repugnant to suggest that everything about a person can be translated into a monetary equivalent. Rather, in contemporary perceptions,¹ there exists a core set of values and personal attributes we resist being brought into contact with money or any other material resource. To put this another way, there are certain facets of being a person which are reserved - those considered to be constitutive of personhood and individuality. We invest these facets with deep emotional intensity because to do otherwise would threaten our sense of moral integrity and wholeness. Sexuality is now seen as one such facet and this is why we balk at the idea of the rapist being fined. It appears tantamount to declaring that "the person" can be bought and sold like a commodity in the market.

The reasons why it is seen as wrong to fine rapist thus are essentially moral ones. Not just in the obvious sense that rape is morally wrong but also because we see it as morally wrong to use money in these

circumstances. Our moral sentiments are offended by the very notion. To use another Smithian term, our natural "sympathy" is affronted.

This argument can be expressed in a more analytical way. Recently both Dorothy Thompson (1986) and Robert Nozick (1974), have argued for the existence of what they call "uncompensatable for harms". What they have in mind is this. For most of the time and for most harms committed against us, we are happy to accept a "principle of compensation". That is, the harm committed by the offender is analogous to a debt and as long as payment is made to settle this debt, the relationship is restored or at least patched up. The payment need not be in money but usually is; as Thompson argues, we conventionally accept sums of money as the price individuals have to pay for damaging us. According to her, the law of delict and tort are based on this "principle of compensation". However, there are some types of harm, committed in certain circumstances, which we exclude from these arrangements. These harms, Thompson and Nozick call, the "uncompensatable for harms". How do these second category of harms differ from the first? Nozick's answer is that the difference lies in the extent they are seen to affect the individual. He asks us to imagine the individual as being surrounded by a "line" or "hyper plane" drawn in moral space. The line is a boundary which other individuals are prohibited from crossing or transgressing. If they do they cannot compensate us. Rather in these circumstances they are punished. But the punishment is determined not by us, but by the agency whose task it is to patrol this boundary and keep it in good order - the state. We need not be concerned for the moment as to why this task of boundary maintenance is the state's rather than our own responsibility. As this stage, I am more concerned to draw parallels between Thompson's and Nozick's argument and mine

concerning the estrangement of punishment and money.

If we stretch matters slightly we can describe the way the criminal justice system works in terms of this distinction between those harms for which compensation is allowed and those for which it is not. My suggestion is that for most of the time and in most circumstances, a principle of compensation is, in fact, at work in the criminal justice system. By this I do not mean that, in the technical legal sense, Compensation Orders as defined, for instance, by the 1980 Criminal Justice (Scotland) Act, are handed out in dozens, but that the heavy reliance on the fine is analagous to the principle ~~of~~ compensation. In other words for most harms, the offender is allowed to pay a sum of money and matters end there (provided payment is made). The recipient of the "compensation" and the agent who is owed the debt, of course, is the court and behind the court, the state. However, there are some harms, like rape, which cannot be dealt with by this principle. These harms, these serious crimes, are the focal point of punishment and it is the response to them which largely determines the view individuals have of the nature of punishment in general, no matter what is happening in the rest of the system. Moreover, to maintain the coherence and simplicity of the message, a series of codes exist one of which is what I have called the cultural estrangement of punishment and money. As a code it works at several levels. For example, it crystallises the images of punishment by suggesting that what happens in response to serious crimes constitutes the normal practice of the criminal justice system. In more concrete terms, as this response is thought inevitably to be a sentence of imprisonment, the prison becomes the "focal meaning"² of the system and of our knowledge of it. At another level, the estrangement of punishment and money, facilitates the use of the

compensation principle. As we saw, in the scale of values used to assess seriousness, the fine occupies a lowly place. The distance between it and the prison allow a de facto "principle of compensation" to operate.

The parallels drawn between the notion of uncompensatable for harms and the idea of estrangement ought not to be taken too far. It is of crucial importance that the response to less serious crimes and offences are described in official language as punishments rather than as compensations.³ As one theme of this thesis is that we must pay close attention to conceptual vocabularies and their context of use we must be sensitive to this. In the second part of this work we show how crucial the conception of fines as punishments is for the operation of the criminal justice system as a whole. It is because sentencers see fines as punishments that potential conflicts and tensions between the various strata or layers of the system are kept in check. Thus, although punishment and money are estranged in the case of symbolically significant crimes like rape, the fine comes into its own as a punishment in everyday, less dramatic circumstances. It is the widespread usage of the fine, that justifies my suggestion that a de facto principle of compensation, is at work in the criminal justice system.

One parallel that we have not yet explored concerns the nature of the boundary in moral space which Nozick claims is drawn around individuals and our notion of the reserve facets of personhood. My argument is that "punishment" starts at the boundary line, or hyper plane. The reserve facets of personhood lie within the boundary and this is one reason why reaction to the violation of them is so emotional and intense. It is this reaction which is channelled into what we call punishment.

Another interesting complexity can be brought out which relates to the

role of the state in boundary maintenance. It seems paradoxical that on one side of the boundary there exist all the most "private" aspects of individuality yet that the agency charged with its upkeep - the state - is one of the most public of institutions. A good deal of modern political philosophy is concerned with where this boundary is to be drawn. For Nozick, there is an acute tension between the two sides; according to him, the state's control over the boundary should be minimal and in present social arrangement is too great. Liberals, too evince concern over how "tightly" the boundary should be drawn; they wish to provide maximum space within it. Arguably, a socialist would wish to take down the boundary altogether or, at the very least, shrink it a great deal.⁴

The example of the (non)use of fines in cases of rape and the parallels drawn with the concept of uncompensatable for harms, helps clarify what is meant by the cultural estrangement of punishment from money. As was said, at the heart of estrangement lies a process of evaluating harm, both that caused by the crime and that which is to be inflicted on the offender. As we have seen, in certain circumstances there is a refusal to allow money to be bought into a close relationship with certain types of harm and when this happens, estrangement has occurred. Although the actual occasions on which estrangement is actively brought into play are few and far between - because serious crimes, by definition, are rare - it nevertheless continually effects the way the criminal justice system operates. It plays a role in the scale of values used to assess harms; "real crimes" - those which are mala in se - deserve punishment which effectively means imprisonment; regulatory offences and less serious crimes - the mala prohibita - can be fined; effectively this means the principle of compensation is at work.

Viewed this way, the phenomenon of estrangement concerns the ranking of values involved in the process of evaluating harms. It is like a shorthand statement, a code, whose message is that certain types of harm are incommensurable. In this sense, it can be perceived as an aspect of the Aristotelian idea that there exists no "just measure" of punishment.⁵ Rather, the justice of punishment, is conditioned by cultural forces. These forces mould perceptions of what sorts of values can be brought into contact and what sort cannot.

The functions of estrangement: a Weberian interlude?

As I have expounded it, the estrangement of punishment and money serves important functions. Essentially these are all to do with legitimating the criminal justice system and maintaining its authority and hold over the populace. According to Weber, an institution is legitimate, in the sociological sense, only when actors accept it and any claims it may make on them; they feel obligated to it. Hence, Weber distinguishes power from authority by the nature of the relationship subordinate actors have to those in superordinate positions. In a power relationship, the latter control the actions of the former by the imposition of will, irregardless of the wishes of the weaker party. A relationship of authority is one in which the subordinate party accepts that the superordinate one has "a right" to make rules and issue orders; legitimacy thus presupposes obligation and voluntary acceptance. (Weber, 1966.)

Weber also argued, there exist three ideal types of legitimate authority: the traditional, the charismatic and the rational-legal. The first of these is based on the acceptance of traditional and immemorial custom; in the second type, legitimacy rests on the "power" of the

charismatic leader who breaks established and traditional rules and patterns of behaviour. In the third type, legitimacy rests on the acceptance of rules as the most rational and efficient means of co-ordinating complex social relationships and institutions. In this type, the idea of rule-governed, calculable behaviour is all important. The bureaucracy exemplifies this type of authority.

Although Weber is ambiguous about it, there is the suggestion that this scheme is evolutionary. Societies develop from traditional authority through charismatic, towards the rational-legal. While, he never rules out the co-existence of one type of authority with another, his broader thesis concerning the emergence of rationality in the occident suggests that he saw the three types of authority as succeeding one another in time. Law and legal institutions play a very important part in this. For Weber, law epitomises authority at each stage of development. Hence, in modern, western, industrial society law, according to him, becomes, increasingly rational and means-end related. Substantive rationality - calculation on the basis of value - is superseded by formal rationality - calculation on the basis of rules.

If we now apply this framework to our subject matter, we would expect to be able to describe the modern institutions of punishment and the process of estrangement, in a language which emphasised their formal-legal, formal rational attributes. We should expect to be able to describe how the process of estrangement contributes to the furtherance of the formally rational nature of the system.

Indeed, from the Weberian point of view, the fine could be seen as an exemplification of the formally-rational; as the mark of its triumph over value and substance. However, if my account of estrangement has any

plausibility then it cannot be described in this way. The use and non-use of money in penal relations is not a cold, mechanical process reducible to description in terms of neutral bureaucratic rules. Rather, usage of the fine rests on what, is better seen in Weber's own terms, as substantive rationality.

The exposition of Weber given above is a little unfair and rather textbook like. As recent scholarship has shown (see, for example, Whimster and Lash, 1987), Weber was far more concerned with the role of values in modern society than the received accounts of his work allows. At the centre of his thought there lies a deep, almost romantic, conception of the conflict between different types of rationality; a concern with the social forces that threaten to destroy the spiritual and the substantive in modern life. But use of the text book version outlined above has been a useful ploy because it highlights the role values play in punishment. This does not mean, of course, that we must simply switch vocabularies and disregard the formal legal and the formal rational altogether. Rather, the task becomes that of describing the social contexts of different rationalities and teasing out how they interrelate. A good part of the second half of the thesis tries to do this.

There is however, one area of law dealing with the evaluation of personal harms that is more easy to describe in the language of formal rationality. This is the area of delict. In the law of delict, money is regularly used to deal with harms committed against the person. Here the principle of compensation is allowed to operate at every level; there exists no category of "uncompensatable for harms. Rather, once fault is admitted or proved, money is brought into a direct relationship with even the most serious damage done to the person. There are no "reserved

facets" of personality which remain beyond the compensation principle. This does not mean there is no ranking of values, but that there is no break in the scale which makes the use of money impossible after a certain point.

Of course there are important differences between the law of delict and that of crime and punishment. The latter is based upon the notion of intention and presupposes the involvement of the state. However, these differences support my broader argument. It is because "values", substantive concerns of a particular and distinct type, are central to the criminal law that the estrangement of punishment from money exists. Where these particular concerns are absent, money is far more easy to bring into the picture.

A similar process is, in fact, at work in certain areas of criminal law those dealing with moving traffic offences and violation of health and safety regulations. In these areas, the need to prove intention is absent and supplanted by a doctrine of strict liability. The removal of the need to prove intention allows fines to be used although the actual damage done to an individual can be very great indeed. Motor cars and industrial machines are dangerous and can cause immense damage, even death. But because "criminal law type" values are marginal, money can be brought into operation much more easily. The principle of compensation is allowed to work.

This all suggests that to understand the functions of estrangement we must appreciate the values for which it stands as a code. The cultural estrangement of punishment from money is central to the legitimacy of the criminal justice system. It shows the system takes seriously the intentional infliction of pain by one person upon another. It stands in a

symbolic relationship to the collective values that Durkheim argued lay at the foundation of punishment. It is part of the process by which punishment appeals to the moral sentiments; it encapsulates the "natural sympathy" we feel for our fellows by indicating that, if another intentionally harms some part of them that we see as central, we will collectively respond.

The complexity of the process however has to be recognised. It is ironic to note that a language conventionally associated with money is often used to describe punishment. It is said that criminals have to "pay back their debt" to society. These debts could be conceived as moral ones, of course, but the idea of debt is part of the vocabulary we normally identify with finance. The presence of ambiguity and ambivalence ought not to surprise us. As Pocock (1987) has argued the key concepts of legitimacy discourse have an inherent "polyvalency". Moral and political language is a complex, fractured vocabulary that is able to sustain a multiplicity of meanings.

The Wider Social Context of Estrangement

So far we have described the nature of estrangement and its relationship to the system of values internal to law. Although this goes a certain way to explain why the phenomenon exists, it does not really face the central issue of why money is perceived to be inappropriate. Why there is this resistance to treating all aspects of the individual as having a direct monetary equivalent? Money, after all, is perceived to be central to modern social life in so many ways. Although it is wrong to reduce the whole of life to a mad rush to gain cash, a good part of each of our lives is spent in the dedicated and serious pursuit of wealth. While

money is said not to guarantee happiness, most of us are miserable if we feel the lack of it. Why, if money is thus so important, do we refuse to regard it as the measure of all things? Why is the image of Shylock still such a resonant cultural symbol? Why do we reject - and the existence of the phenomenon of estrangement is evidence of this - a purely economic description of human personality and social relationships?

The rest of this chapter will be devoted to exploring possible answers to this cluster of questions. My argument will be that the answer is to be found in the complex, ambiguous attitudes toward money that form part of traditional western political and moral beliefs. On the one hand there is seen to be a close symbiotic relationship between money, the pursuit of wealth and the values of the "good life": Money is perceived to be an essential prerequisite to the progressive enhancement of personal and collective competence. For example, this is the view that Smith and Hume adhered to: according to them money and commerce in general lack human potentialism and thus encourage individuals to be more free and in control of themselves. But, on the other hand, money is seen in the opposite way. In this view money, indeed economic relationships in general, are seen as a form of evil. Money is said to corrupt virtue and to debase our essential humanity. This line of interpretation runs from the classical idea that virtue was corrupted by commerce and money right through to the modern classics of sociological theory. Marx, Weber, Durkheim and Simmel all argued that money debases the soul. They saw capitalism as "evil" precisely because the pursuit of wealth alienates humans from themselves and from others; for these theorists money is the potent symbol of capitalism and of capitalist social relationships. It symbolises the alienating tendencies of modern society which all work to dehumanise people

and the relationships they have with others.

Some scholars see this ambiguous attitude towards money and commerce as being so central to modern western political culture that they have written, or rather called for the rewriting, of political history in its terms. John Pocock, for example, in a series of magisterial studies, has argued that the clash between wealth and virtue on the one side, and wealth and liberation on the other, is one of the activating forces of modern politics (see Pocock 1975, 1983, 1987; for a less exciting study see Reddy, 1987). We need not enter into the intricacies of this debate to see its relevance to our argument. This profound, deeply rooted ambiguity underpins the dissociation of punishment from money. By this I mean, the estrangement of punishment and money feeds off this idea of money as dehumanising and alienating. It is because of this association with the debasement of human relationships that the estrangement exists. Simmel puts this particularly well. He contends that our sense of "human worth" and developments in money move in opposite directions. He wrote,

"The increasing valuation of the human soul with its uniqueness and individuality meets with the opposite trend in the development of money..." and

"It is precisely because money represents the value of incommensurable things and has become colourless and indifferent that it cannot be used as an equivalent in very special and uncommon conditions where the inner most and most basic aspects of the person are concerned"

(Simmel 1978 p 365)

Simmel could well be describing the refusal to use fines in cases of rape. By the "innermost aspects" of the person he is referring to what we called the reserve facts of personality. - We can build on what Simmel said. It

is not only in relation to the "innermost" aspects of our lives that money is found wanting today. The same process can be discerned in the more public aspects of our lives as well. For example, the conditions of citizenship have effectively been separated from any contact with material resources. Once there existed quite definite material preconditions to the exercise of political liberty but these have now been removed. First, the possession of land, then of other sorts of property were necessary before an individual could vote; again, once bankrupts could not vote. But we now measure political progress by the extent to which we have overcome such obstacles. We now see liberty as an almost inalienable right an individual possess simply by virtue of being competent - that is not mentally infirm, eighteen years of age and not being resident in one of Her Majesty's prisons. Even the present Tory Government, who have made "value for money" and "cash limits" a way of life, have most exempted from these strictures those areas of policy they see as bound up with the maintenance of liberty - law and order and defense. But, at the same time, they have burdened one part after another of the welfare state by these demands, in part because they do not see welfare as essential to liberty. For them the poor are as free as the rich.

Although many quite rightly object to such a point of view, their objections would probably not be based on a reversal of the fundamental idea that liberty and money ought to be kept apart. Instead they would probably point out that the effective exercise of this freedom, is conditioned, in practice, by how "well-off" we are.

This is probably true but it does not constitute a counter-example to the idea that money and a whole set of personal and public values are now kept separate. We commonly say "that money cannot buy happiness" that

"freedom is beyond price". We ought not to forget that in some slave societies there was the occasional slave who lived in luxury yet by definition, was not free.

It is my argument that the cultural estrangement of punishment from money must be placed in this broader context and be seen as one specific manifestation of the more general social development we have described. However, estrangement is a particular expression of these developments and has particular conditions of existence. One of these is the relationship it has to the state. We have touched on this question already but we must now consider it again.

To make a rather obvious point, estrangement takes place in a criminal law context. Thus brings the state into the picture, because it is the state that backs up the criminal law.

Now some may move from this observation to a conclusion which I claim does not follow. They may say as the state is necessarily involved, that the process of estrangement can be explained as a purely political phenomenon. This picks up on the tendency we described in the last chapter to see punishment as an instrument of power. How tenable is this argument?

My claim is that the phenomenon of estrangement shows particularly clearly the restrictions and limitations of this position. Although I readily admit that the state is a condition of existence of estrangement, I contend also, that it cannot be viewed just as one of its instruments. The weakness of the instrumentalist position is that it assumes all aspects of the state are describable in the concepts of domination and subordination. That political relationships are just about these type of repressive forces. This is a very limited conception of politics and of

the state. We can see its limitations by looking at what most people would admit to be an example of an extremely repressive society, say Nazi Germany.

This example is illustrative because it appears that the Nazi state received considerable support from large sections of the German population. It is very difficult to see how the "success" of Nazism can be explained unless we assume this. Similarly, to take another example, that of slavery. Again, on the surface a uniquely repressive relationship; but can one explain slavery just in terms of repression? The folk-tales of "loyal slaves" indicate that one cannot.

This can be put more directly. Politics is not just about the use of repression; even the most extreme relationships cannot be explained purely in its terms. This is a rather obvious point, which, for example, a Foucauldian would accept. But as Ignatieff (1981) has pointed out, when it comes to the area of punishment it seems to be forgotten.

This is relevant to my argument concerning estrangement. The fact that the criminal law is backed-up by the state does not mean we can explain the criminal law just by reference to it and the vocabulary conventionally used in the literature to describe it. Although, it might appear inconvenient, we cannot escape the conclusion that many of the values the criminal law exhibits are those which the wider populace accepts. In Weberian terms, they are legitimated values; people voluntarily accept them and feel obligated towards them. For example, I believe most people would see it as right to deal with drug pushers in a harsh manner; most people do want some minimal form of protection by the police and so on.

Thus, although estrangement is tied to the state it is quite wrong to

try and explain it in terms of power. Rather, we ought to see estrangement as existing at the point where morality and politics converge.

There is another argument that justifies consideration. There may be some who react to mine by saying it is too idealist; that it takes the realm of values, ideals and morality too seriously and that what we see in the criminal justice system is a gloss of ideology covering up its workings. Furthermore, they may say the preponderant use of the fine is best understood as an extension of capitalist society's tendency to turn everything into a commodity. Such a position can be found⁴ - or at least made to come out of - the work of Rusche and Kirchheimer (1938). Rusche and Kirchheimer argue that the heavy use of the fine is an indication of the growing commercial nature of the system. By this they mean, it is an example of the search for ever-cheaper ways of running the penal system; the fine raises revenue, costs relatively little to administer compared to the prison and thus offsets the fiscal burdens. But they give another, deeper meaning to the term as well. They argue the use of the fine is directly related to the "monetarisat⁵ion" of society. This allows them to allude to the classic Marxist argument, that in capitalist societies a "cash-nexus" progressively bites into all social relationships; we are all forced to exchange parts of ourselves, for example our labour and its products, for money.

This is a strong and important argument and as a portrayal of the nature of capitalist society it has immense appeal. Also it is not a specifically Marxist one; one finds the same general image of capitalism in Simmel and Weber (but explained differently). It would be foolish to try and counter the more general points of this position, and nor is it necessary to do so. My point, rather, is that if the preceeding account

of estrangement has plausibility, then it shows the limits that we placed on monetarisation. The estrangement of punishment and money shows that the values of money do not impinge on every aspect of social life, precisely because estrangement is a refusal to find monetary equivalents for certain core aspects of it. The fact that the fine is perceived to be an inappropriate sanction for rape, indicates that certain values are placed above money. One cannot explain estrangement in terms of the logic of monetary calculation.

The Cultural Estrangement of Punishment and Money; the fine and the criminal justice system

In this concluding section I shall pull together the various strands of the argument. My main points can be summarised thus:

(a) That there exists a phenomenon called the cultural estrangement of punishment and money which is deeply embedded in the contemporary criminal justice system. The values used to assess the seriousness of harm are partly organised around this phenomenon and, as a result, some harms are seen to be incommensurable with others.

(b) But this process of estrangement works only at a certain level of the penal and criminal justice system; that within which its core values are legitimated. However, our image of the nature of the system, as a whole is coloured by what happens here. One consequence of this, is that we perceive the system in terms of it. To put this another way, we tend to view the system as a whole on the basis of what happens in a relatively few number of cases. These cases are thus of immense symbolic significance; as it is generally thought that the prison will almost certainly be used in them we end up perceiving the prison as the epitome of

punishment. This is one reason why the prison symbolises most clearly what we understand punishment to be like.

(c) I have also tried to show that the existence of this phenomenon, as well as being crucial to our understanding of how the criminal justice system works, points to the need for a form of explanation that gives priority to the sentiments. My claim is that to understand estrangement we have to put it in the context of those factors which mould our perception of the nature of harm and of money. With regard to the latter, we noted the ambiguous, equivocal way it has been discussed in traditions of political thought. But alongside this we observed also the modern tendency to separate some core values of social life from material conditions. In the chapter this was discussed in relation to liberty. However, the ambiguous attitude towards money can be seen also in rules of etiquette and aristocratic manners. There is a long tradition of despising those in "trade"; those who work to gain money and make profit. This was a crucial aspect underlying the rise of the "commercial classes" in the nineteenth century and their relationship to the established gentry and it has ramifications now. In more contemporary times, Mrs Thatcher has endeavoured to counter the "anti-entrepreneurial" spirit; to try and make money a "polite symbol" and not an indication of bad manners. The fact that she has perceived the need to do this shows how deeply rooted the ambiguity towards money is.

As was said, there is nothing new in a framework which emphasises the moral sentiments. Lord Kames, for example, in his Historical Law Tract on Criminal Law, analysed punishment as being founded in the natural passion of "resentment". The desire to punish those who harm us, according to Kames, is based in the hostility we feel towards our enemies. Modern

systems of punishment have not so much separated themselves from this desire as channelled and controlled it. Kames argued that resentment was a strong, uncontrollable and irregular passion and thus could not constitute a stable basis for an increasingly complex society. Rather it was bought off first by the more "stable" but equally strong passion of "avarice" - and this is why earlier systems of punishment give a major place to monetary sanctions - and then was "engrossed" by the Magistracy and the Commonwealth. As the latter, was for Kames, undeniably a "higher" form of civilisation, it further quelled the wish to cause devastating harm.

Kames's account is one sided. As well as appealing to or being founded in resentment, punishment has traditionally been conceived in terms of the opposite passions of love and fraternity. This is clearest in the Christian tradition, where doing penance was seen as an expression of love both for God and his earthly community. But this same line can be seen to be behind, for example, more modern strategies, such as treatment and rehabilitation. It is surely relevant that many of the earliest prison reformers were committed Christians. They saw their activities as the natural extension of Christian love. These can be seen as almost a "technology of love" - the desire to help and reconstitute those who have fallen from grace. The earthly paradise the reformers sought after, has been lately criticised, but it is quite wrong to disregard it as it is a particularly interesting expression of a search for a secular form of love. Love for our neighbours is the basis of fraternity and as Aristotle once said fraternity is the focal case of all sociability. This is another way of putting the Durkheimian thesis that punishment is fundamental to the category of the social.

In this chapter I have tried both to show the complex way money enters into penal relations. It both invades them and is simultaneously ruled out of court. These apparently counter tendencies mean that discussion of the area is fraught with ambiguity and dissonance. We must understand both why the criminal justice system relies heavily on the fine for certain crimes and offences, yet rejects their use for others. Part two of the thesis is largely taken up with unravelling this apparent contradiction. One purpose of this chapter, as it was of the preceding one, has been to provide some idea of the type of question we must face and the sort of conceptual tool we shall need to construct answers.

'Making fine: Being fined': Towards an historical analysis of monetary sanctions

I

This chapter is something of an historical interlude. Its objective is to explore the long-term historical development of monetary sanctions from their use in the medieval Scottish legal system up until the middle of the nineteenth century. The narrative is then continued in the next chapter by a detailed statistical description of the use made of fines in the criminal courts between 1897 and 1978. Given the time-span covered, I cannot claim that what follows in this chapter is a detailed or an exhaustive history; it makes no pretense to be such; it is not a 'history of punishment through the ages'. Instead, my concern is to try and describe general patterns of change and development. Such pattern seeking may seem premature, if not downright dangerous. With proper caution, it might be pointed out that much detailed work still needs to be done; that there exist many blind spots and shortcomings in our knowledge of legal change and changes in punishment. In particular, little is known about the pre-modern system. This shortfall is most keenly felt in relation to the pre-modern Scottish system, where, for the earlier periods, documentary evidence is anyway scarce (Black, 1975 p.47-48).

Such caution is never misplaced but equally there is always room for the synthesising exercise. Detailed studies make better sense in the light of knowledge of patterns; it is the latter which allows interpretative significance to be made of the former. We need maps, if we are to find our way. But map building of the sort that follows can be a hazardous exercise. It involves making conjectures about the lie of the land and this can be dangerous, if the wrong route is chosen. Nevertheless, the very fact that we make conjectures allows, in true Popperian fashion, ideas to be tested and refuted. "Conjectural", "Speculative" or "Philosophic history", as it is sometimes known, is a meritorious exercise with its own pedigree (see Hall 1987, Hont and Ignatieff 1983, Burrows 1981).

The pattern described in this chapter is captured by the first part of its title. My argument is that the use of money to deal with legally defined harms has undergone a fundamental change. From an earlier medieval practice of 'making fine' - that is of negotiating the settlement of harms and disputes by the payment of a sum of money - there has been a change to the modern practice of 'being fined' - that is the criminal court imposing a sum of money on the guilty offender, theoretically without any negotiation. The reasons accounting for this change are complex but can be put into three categories. On the one hand, the change is tied up with the emergence of the state and its 'engrossing' of the power to punish (Kames, 1792 p.39-49). On the other hand, it is to do with equally far reaching changes in the structure of ideology and belief, particularly those relating to changes in Christian theology and teaching about sin, redemption and the role of penance. The third category of reasons are those to do with changes in

the structure of law and the legal system; law has become more specialised and differentiated into separate spheres and there have been accompanying changes in legal institutions. In Weberian terms, there has been a protracted process of rationalisation. The relationship between these three categories is complex and I do not argue for any particular causal connection. It would simplify matters too much to contend, for example, that all can be explained by the emergence of a new system of state power. Rather, the relationship between them is interactive. However, the third category of changes can be viewed as having been squeezed out of the relationship between the first two, but this is not to deny it a causative significance of its own.

There is another broad objective sought after here. In the introduction, I argued that punishment has developed along two vectors, while clearly the focus of attention here is with the monetary sanctions, the other vector, which consists of the bodily punishment, has to be brought into the picture. In the existing criminological and historical literature it is the latter vector which has been most studied. Most historical work in the area has been primarily concerned to trace the development of the bodily punishment and their complementary serious crimes. This is partly because, as was said in chapter one, writers work with a very modern notion of crime and how to classify it. Consequently, most attention has been on the history of murder and theft, the blood sanctions, other physical punishment and the prison. This has diverted attention away from the 'ordinary' punishments actually inflicted by the court. Study of the atypical has in many ways constituted the norm. It has influenced, for example, the

editing of collections of primary case material, with the result that the serious crimes and the bodily punishments became overrepresented (MacTaggart, 1968 intro). The influence of this on the structure of historical knowledge cannot be overrated. One result particularly worthy of note is the overwhelming attention paid to royal justice. Partly because the crimes mentioned above belonged to the pleas of the Crown, and partly because, as Wormald points out, it was royal justice that was most recorded, we have ended up with a somewhat narrow view of the nature of medieval legal systems (1983 p.109). Historians are only now beginning to focus on medieval 'local' justice and thereby constructing a fuller and more balanced account (see for example Wormald, 1983; Bossy, 1983; Reynolds, 1984; Lenman and Parker, 1980). Moreover, one can discern a line of continuity between this concentration on royal justice and the explanation of punishment in terms of a vocabulary of state and power. Because investigation begins with a modern, state based view of crime, law and punishment, only such evidence as fits with this becomes selected and thus part of 'history'. This history is then used to support the idea that law, crime and punishment follow a road signposted by royal justice at one end and the modern state at the other.'

One task of this chapter is to counter this imbalance. This necessitates looking at the administration of justice beyond the 'state' in the localities; it also requires that we show just how often fines and other monetary sanctions were used, not just for the lesser crimes and minor offences, but also for the serious crimes. And, to fully understand how deeply money was embedded in penal relations, we need to appreciate that the avoidance of penalties by the payment of

money was an essential aspect of medieval criminal justice. The medieval system has its own forms of 'diversion' that depended upon being rich or at least comfortably well off.

The risk in all this is of developing tunnel vision and a tunnel history, but if doing this brings to light a broader conception of the history of punishment, then the risk is worthwhile. We ought from this vantage point, anyway, to be able to gain a better perspective on the relationship between the two vectors along which punishment has developed.

II

There is a conceptual problem that stands in the way of appreciating the role money has played in the history of penal relations. This is the tendency of historians and sociologists alike to categorise the use of money as a type of compensation. On those few occasions when the use of money has been recognised, its significance is played down. Once it is seen that a sum of money is paid to the victim of a crime or to the victim's kin, it has been assumed to have very little to do with the history of crime punishment.

For example, there is a well entrenched view that assigns the use of money to the proto-history of criminal law proper. The story that is told goes something like this; once all harms, with the exception of the pleas of the Crown (murder, arson, theft, rape and treason), were conceived of essentially as private harms, even if they were called crimes. The response to these harms was either to enter into a bloody feud or to pay a sum of money to the injured party or to do both. Crime

thus was dealt with either by vengeance or compensation or a mixture of the two. These payments are known in the literature as 'compositions' and the process of payment as 'compounding'. However, the story continues, with the development of the 'state', in the form of royal justice, these 'compositions' became divided into two sorts; one sort continued to be paid to the victim, the 'state' getting none of it, and payments of the other sort went to the state. From the first sort developed the law of delict, tort and remedy, and from the second the law of crime and punishment. Only those payments made to the 'state' are said to deserve the title of fines. But, once this division came into existence, and for reasons nobody is quite sure of, the state stopped using money to punish people and used physical punishments instead. One common variation in the story is that the 'state' only kept the fine because of its revenue raising possibilities. However, if fines continued to be used then it was only for minor breaches of rules and regulations.²

This is, of course, something of a parody, but, nevertheless, it represents a view that underpins much legal history. It is the story that law students are very often told and it reverberates more widely in the literature although admittedly sometimes with greater complexity. For example, one can find this story prefacing the study of the fine in twenty one different countries by Gerhardt Grebing. After reviewing the earlier history of monetary sanctions, tied as they were, he claims, to the principle of *lex talionis*, he says,

"with the emergence of state administration of criminal justice, monetary penalties finally lost their compensatory character and

took the form of genuine fines in most countries" (Grebing, 1982 p.6; underlining in original).

Schaffer tells the same story in his, *The Criminal and his Victim* (1968), and even rhapsodises about the lost 'golden age of the victim' in the period of compensation. Again, in a slightly different vein, one finds the same essential picture portrayed by Michael Weisser. He argues, the medieval system is best characterised as a system of 'private criminal justice', which 'rested upon the necessity to compensate the victim' and in which 'the basic form of punishment was the fine' (Weisser, 1982 p.62-63). The same story is told by von Bar et al., in the massive volume six of the Continental Legal History Series (Part one pp.4-372).

What is wrong with this well established and apparently well researched view? The problem lies with the organising concepts. There is a basic misconception. It is assumed that because in modern law compensation is ambiguously related to criminal law and punishment, the same must be true of earlier periods; that, because in modern law compensation is conventionally tied to civil law and the law of delict, our progenitors must have seen it in the same or very similar way. Thus, it is implied, medieval criminals and victims would not have seen the payment of sums of money as in any meaningful sense a form of punishment. Hence, these 'compositions', the practice of 'compounding', are seen not to belong to the history of punishment or to have at best a marginal status within it. As a result, it is further implied, that the history of punishment does not really begin until the period after these 'compensatory' payments have died out or at least been demoted to

a subordinate position below the physical punishments which form the proper place at which to start.

If we return to the metaphor of maps used before, the significance of this view for our understanding of the history of punishment is immense. We use maps to guide us on journeys and starting points are all important. I suggest, the above is an inaccurate rather than a completely wrong starting point; but that if we accept it, our sense of historical patterning becomes blurred. The core of my counter-argument is to suggest that medieval actors would not have recognised the distinction between punishment and compensation that we make and upon which the above view is based. As Maine put it, "The distinctions of the later jurists are appropriate only to the later jurisprudence" (Maine, 1905 p.230). To understand the type of distinction, if any, medieval actors would have made, we need to recover their jurisprudence and, to do this, we must understand their legal system.

III

Although it had its distinctive features, the medieval Scottish legal system shared many traits with others in Europe, with the exception of the English one.³ It was decentralised, administratively, with a patchwork of overlapping jurisdictions and a variety of courts; the law was undifferentiated, in the sense that there existed no clear-cut distinction between civil and criminal law and, thirdly, there was an emphasis on what today would be called "negotiated justice" - at least for those who were rich and powerful enough to be listened to.

The administrative structure of the system reflected a society that was small scale and local. Also, it reflected a society in which kinship groups were a source of great social power. The Scots Sovereign had to listen to his nobles, negotiate with them and also very often arbitrate their quarrels. Although it would be an exaggeration to say that there was no royal justice and that the sole responsibility for pursuing all crimes lay with the kinship group (Brown, 1977 p.63-64), it is certainly true that prosecution was largely a private matter. With the exception of the pleas of the Crown (murder, theft, rape, arson and treason), for which the Sovereign took some responsibility, it was the individual or the family group who raised the prosecution and pursued it to its end either in one of the franchise courts or the King's court or very commonly by negotiating a settlement through feud.

Although by no means unique to Scotland, the franchise courts - the heritable jurisdictions - played a central role in the administration of justice. The Sheriff courts, the regalities and the baronies could all be passed down along the family line, as could the position of Justiciar until the resignation of the last heritable Justice General, Archibald, Earl of Argyll in 1628. And beyond that date, Archibald reserved the office of Justiciar of Argyll for his heirs until all heritable jurisdictions were abolished by the 1747 Abolition of heritable Jurisdictions (Scotland) Act.

These franchise courts were created by royal grant, very often in exchange for a large sum of money. At their apex was the Regality which has been likened to "sub-kingdoms" (Davies, 1980 p.145)⁴. The larger regalities such as Orkney, Argyll and Dunfermline, had their own administrative structure with a chancery that issued briefes. If the

original grant included the power "of pit and gallows", the regality court could hear the pleas of the Crown and execute guilty offenders.

The relationship between the holders of these grants and the Sovereign is a matter of some controversy. Davies, for example, contends, the regalities placed "large numbers of the King's subjects...outside his jurisdiction" (Davies, 1980 p.141), while Lord Kames, saw the question as "uncertain" and was "inclined to think they were not" (Kames, 1792 p.204). Wormald, points out that the selling of grants did not betoken a weak Sovereign because the whole process rested upon the presumption that the Sovereign held the jurisdiction to sell in the first place. Thus, she argues, this lent support to the Sovereign's position; the noble could only purchase the grant by recognising the Sovereign's power (Wormald, 1983 p.129).

The other heritable jurisdictions, the Baron and the Sheriff Courts, did not have such extensive jurisdictions. Sheriffs could not hear the pleas of the Crown, except when a thief was caught "with the fang" (in possession of stolen goods) or when slaughter was publicly committed in hot blood. Then the murderer could be hanged, if the whole process was over within twenty four hours of the original crime. Originally introduced by David I, the Sheriff court was an Anglo-Norman institution and supposedly part of royal justice. However, in practice, control was lost as the heritable shrievalty developed (for details see Dickinson, 1928 intro).⁵

The Baron Court had similar powers to those held by the Sheriff. It could hear "minor" criminal cases, but most of its work was with petty debt, possessory actions and the enforcement of feudal obligations.

These courts were later supplemented by the Burgh Courts - some of which had charters stretching back in time - and the Justice of the Peace Court. The Justice of the Peace Courts were modelled on English lines and were first introduced with partial success in 1587. Both these courts, especially the Burgh Court, were concerned with enforcing "guid nichtburheid" and other local issues.

Royal Justice, centred in Edinburgh, was slow to develop. There was no central court as such, excepting the Sovereign's Curia Regis, until 1532, when the College of Justice was established, consisting of fifteen Lords of Session. In as much as a distinction can be drawn at this time, between civil and criminal law, this body was supreme in civil matters. It was not until 1672, that a separate High Court of Justiciary was founded as the highest court in all criminal matters.

As was said, this decentralised legal system, in which there existed a delicate balance between core and periphery, reflected the decentralised social structure of locality and kin. It also, however, reflected a theory of "popular sovereignty"; the Scots Sovereign was held to be subject to the people. As Buchanan put it, the people have "the power to grant Imperium to their King"; "he, (the Sovereign) acts like a guardian of the public accounts". But this granting of imperium did not amount to wholesale "transmission" of their own original sovereignty; rather, the people simply "prescribed to their King the form of his Imperium" (Buchanan, 1579 in Skinner, 1978, vol.2 p.340).

This theory of popular sovereignty did not go unchallenged and was countered implicitly, for example, in the Basilikon Doron of James VI. But, Buchanan's work was massively influential in Scotland and was well known on the Continent. The idea of "popular sovereignty" captures a

contemporary view of the proper balance between the power of the centre and the power of the people. It can be read as a well worked ideal justification of the nature of Scots society. The view it put forward meshed with the reality of the legal system. Royal justice was to work hand in hand with local justice, as the best way to maintain the peace of the realm. But the King's "peace" was only one, albeit a very important one among others (cf. Harding, 1973; van Caenegem, 1973 pp.1-29).

This decentralised legal system was mirrored by the undifferentiated structure of the law. There was no clear-cut distinction between civil and criminal law. Rather, there was a generic conception of harms as delicts. A distinction was drawn between "private" and "public" delicts, and both were called crimes. This was not the sort of distinction we now draw between criminal law and civil law. For example, MacKenzie⁶, writing in the early modern period, chose to phrase the matter this way. In the section on "The Division of Crimes" in his "Collected Works", he says

"Crimes are divided...into public crimes and private crimes.

Public crimes are defined to be those, which any person may pursue for public revenge and whereof the punishment is stated by an express law. And, a private crime, which none can pursue but the party injured and which is not declared to be public crime by an express law" (MacKenzie, 1722, vol.2 p.60).

This is not so much a distinction between two types of law as between types of procedure for dealing with types of harm. Of course, the modern distinction between civil and criminal law has a similar procedural edge to it, but, we must remember that MacKenzie was writing

in a context where the primary responsibility for prosecution, as we saw, was still private. Indeed, later in this section, he tries to argue against private prosecution - which anyway was being challenged by the rise of the Lord Advocate, (MacKenzie being one) - but his case turns out not to be one founded in any deep legal theory. Instead, he argues that private prosecution is "inconvenient and unnecessary", and he "wish[es] it were otherwise" (MacKenzie, 1722 p.60-61).⁷

Pollock and Maitland, in "The History", appear deliberately to have set out to challenge the forcing of modern distinctions onto historical material of the early medieval period. They say,

"We shall...pass backwards and forwards between civil and criminal procedure, just because most modern writers have sedulously kept them apart" (Pollock and Maitland, 1898, vol.2 p.573).

Moreover, if we return to Scottish materials, we must recognise that when the term civil law was used, it covered a variety of meanings. Sometimes it referred to Roman Law, sometimes to the law of a particular nation or town.

Another aspect of the lack of distinction between civil and criminal law is evidenced by the lack of emphasis placed on the need to prove "intention". In modern criminal law, the doctrine of *mens rea*, the requirement to show that the accused intended to commit the crime, is a condition *sine qua non* (cf. Hart and Honore, 1986). It is one of the core principles by which the criminal law is distinguished from the civil law. However, in the medieval system no great emphasis at all was placed on proving intentionality. For example, in the scale of penalties set out on the "Leges inter Brettos et Scotos", no relevance

is given to the determining whether a harm intentionally committed should result in a larger sum being paid than if the act was "accidental". The scale is purely concerned with describing what payment should be made, if an arm as against a leg is damaged or hurt. In later medieval Scotland, if it is true, however, that if, say, a theft was "forethought", then a harsher penalty could be prescribed. But this is still very different from requiring proof of intention before guilt can be established.

The doctrine of "dole", as it was known in Scots jurisprudence did not become an essential aspect of the criminal law until the eighteenth century. And then, it was not the English form of mens rea. There was no need to prove specific intent to commit a particular act, but rather, to show that the person was of "corrupt and malignant disposition" (Hume, 1844 p.22).

The jurisprudence of medieval Scotland thus lay little emphasis on distinguishing between different branches of the law. It did recognise a distinction between public and private harms, but this was not the foundation of two separate branches of law and legal reasoning. It merely indicated that the form of action needed to remedy the harm was different.

It was in this administrative and jurisprudential context that what I have referred to as "negotiated justice" took place. By "negotiated justice", I mean that the process of settling disputes and harms was premised in the assumption that disputants ought to enter into negotiation to determine where responsibility lay and what the "solution" should be. These negotiations took place both outside the formal court structure and also within it. It was considered better to

settle disputes amicably rather than go to court. Often, the resort to a court was a sign of failure; it showed that the two parties had been unable to reach agreement. This makes sense of the practice that both could be liable to pay sums of money to the court. Parties could be amerced - that is lay in the mercy of the court - and any penalty that resulted could be increased, the "extra" going to the court as if indicating its displeasure (MacTaggart, 1968). There were also a number of "half-way house" type measures. Parties could go to the court after they had settled the dispute to get the court to recognise the agreement and, in these circumstances, it was not uncommon for a "cautionary bond" to be lodged and a third party to stand "surety" for it. Those who stood "surety" thereafter took responsibility to see that peace was kept (see MacTaggart, 1968; Lenman and Parker, 1980 pp.20-22). Again, if this involved reappearing at some future date before an "ayre" and one or other of the parties failed to turn up, the third party could be amerced (see Pitcairn, 1833, vol.1 pp.149ff).

Perhaps the most dramatic example of this process of negotiation is the payment of a sum of money in assythment. Assythment worked this way. The parties involved in dispute could agree on a sum of money to be paid either to the injured party or the surviving relatives. If an agreement was struck, then a "letter of slains" was issued. This letter indicated acceptance and ended the dispute. Once this point was reached, further prosecution was ruled out; the victim or remaining kin, in the case of slaughter, in effect sold the "right" to pursue the case further.

Assythment is mentioned for the first time, in existing records, in an Act of Parliament passed in 1424, though it is thought to

preexist[that date and is probably derived from the Middle English word *assithe* (Black, 1975 p.53; Wormald, 1983 p.107). It is defined in Balfour's *Practicks* as "amendis for sla^tughter or mutilations" (Balfour, 1597 p.517). It was relevant only in criminal cases, but all homicide in Scotland, however caused, was criminal until the beginning of the eighteenth century. The one situation when assythment could not be sought after or offered was when the "offender" suffered capital punishment. In these circumstances, however, the estate of the executed person were "escheat" to the Crown. For example, in March 1535, one John Armestrong, alias "Jony Gutterholis", and Christopher Henderson, "convicted of theft, reset of theft, outputting and inputting, in England and Scotland; And of art and part of treasonably inbringing Englishmen,⁹ common thieves and traitors within Scotland, and committing common Hereship and Stouthief, Murder and Fire-raising" were sentenced to be "Drawn to the gallows and hanged as Traitors; And all their goods, moveable and immoveable, to be escheated to the King" (Pitcairn, 1833, vol.1, p.173).

In the later medieval period, assythment was directly tied to the granting of pardons and remissions. The process worked two ways. First, the granting of a pardon did not remove the liability of the offender to assythe the kin of a slaughtered person; indeed, the offender remained open to further prosecution until a letter of slains was issued. Successive sovereigns, in fact, would not grant pardons unless the remaining kin joined with the offender. There thus existed a close relationship between assythment and the granting of pardons and remissions. From the offender's point of view, there was no point in offering assythment unless it was tied to a pardon or a remission, and

from the victim's or remaining kin's point of view, unless assythment was agreed to, there was every chance the offender would be executed and thus payment of the "damages" lost (see Gane, 1983).

The practice of assythment illustrates the general features of the medieval system extraordinarily well; it shows the balance between the centre, the Sovereign, and the locality; it shows the "mix" between what we would regard as "civil" and "criminal" law; it shows also how the process involved negotiation and compromise at every level.

Assythment was a popular and general action, and continued to be practiced well into the eighteenth century. As it developed, it was increasingly recognised by the courts. It settled blood feuds as well as "normal" crimes (see Brown, 1986). Its decline was due to the coming together of a number of different developments - the emergence of a clear distinction between civil and criminal law, the growing resistance to the granting of pardons and remissions which by the seventeenth century had an extraordinary bad press, and the development of public prosecution with the rise of the Lord Advocate. In short, it disappeared with the gradual modernisation and rationalisation of the system. However, the last, and unsuccessful, attempt to raise an action of assythment was in 1970 in *McKendrick v Sinclair* (see Black, 1975).

Judging from the commentaries on it, assythment appears to have been most used in the later stages of medieval and in early modern Scotland. Other "compensation" systems and other monetary penalties both predate it and run alongside it. For example, many of the earliest published legal records contain detailed lists of the payments to be made, often in cows, to an injured party. The "Leges inter Brettos et Scotos" included in the "Regiam Maiestatem", are little other than

such a list (Book IV, chapters 36-40). The words used to describe the sum paid are of mixed Welsh and Irish derivation; enach, cro, kelchyn and gaenes (Welsh, galanas). Other terms were used also; kinbut was a late medieval Scots term referring to a payment to the relatives of the kin. A rarer term is cynebot, which appears to have meant a payment to the Sovereign (Wormald, 1983 pp.105-109).

The principles upon which these lists or "tarrifs", as they are sometimes called, is twofold. The quantum depended both on the degree of damage done and upon the status of the two parties. For example, the cro for a King was usually set so high that it was, for all practical purposes, unpayable. The result of non-payment was forfeiture of all goods and death (for detail see Davies and Fouracre, 1986 passim).

The other monetary sanctions commonly used in medieval Scotland were, as noted, cautionary bonds, amercements and also, most common of all, the fine.

It is important to note that there was a good deal of interchange in the use of all these terms. One can find examples of assythments, which in the records are called "fines". Black (1975 p.53) claims to have discovered such a case. Amercements were also called fines (Fox, 1927 p.134). This interchangeability can be ascribed to the origin of the term, "fine".

"Fine" is derived from the Latin expressions finis, finem fecit or finem facere (Fox, 1927 p.137; von Bar, 1916 pp.60-62). Originally, it simply meant an agreement that brought to an end (finis) a dispute. It was not specifically tied to the criminal law. For example, one of the most common forms of medieval English conveyancing was also known as "the fine". This was a process of alienating land without the expense

of registration and the records of these land transactions are contained in those volumes known as the "Fleet of fines".

The use of fines in criminal cases involved an element of negotiation analogous to that used in assythment. Pollock and Maitland describe the fine as a "bilateral transaction"; fines were "made", "not imposed" (1898 p. 97). One "made fine" with the court or the King.

Fox argues, at great length, that this process of "making fine" underlay its medieval usage. Apparently, one "made fine" in those situations in which one's body was held in "ward", as the Scots would have put it. Now, being held in "ward" did not necessarily mean being held in a prison; there existed "free ward" as well. But if one's liberty was restricted, one negotiated with the court to pay a sum of money which freed the ward and also settled the dispute. It is this process of negotiation that Fox calls "making fine" (see also van Caenegem, 1959 passim).

Although Fox describes a necessary connection between "imprisonment" and "making fine", he does not see the fine as "second best"; as simply a method the rich could use to buy themselves out of the prison. Rather, according to him, the reverse was true; the fine was the punishment and the prison the potential method of enforcement. He says,

"It might be said that the fine was the punishment, and imprisonment was the means of enforcing payment (1927 p. 137).

A similar picture is painted by Pugh. He provides many examples of this type of relationship between the prison and the fine, but also argues that the fine could be introduced at a later stage, once

imprisonment had taken place (Pugh, 1968 pp.28-47 and 14-16). But, whatever the exact relationship between the prison and the fine, Pugh still uses the term "to make fine" rather than "to be fined". Hence, he too portrays the use of the fine, at this time, to have involved negotiation.

The expression "to make fine" seems not to have been used in Scotland. Nevertheless, there are many examples of a similar relationship between warding or coming into the King's will, amercement, assythment and standing surety. And, given the interchangeability in the uses of terms, one can conclude that the same broad process was at work. Take these examples:

Alexander Baxter and George Bell were convicted of blooding and wounding and were sentenced to be "amerciat" in 100 merks, and were also ordered to "find caution for the fine or also be imprisoned until they paid it" (Records of the Proceedings of the Justiciary Court, p.52), or one Duncan MacKenzie was fined £100 for striking Donald McVicar and was "ordained to continue in prison until he paid" (Stair Society, vol.12 p.140).

The records are full also of many cases of "compounding" - that is offering a sum of money as payment for the crime committed. The courts clearly recognised this as a standard procedure. For instance,

"Thomas Fresale, allowed to compound for the forethought felony done to (John) Mcke, merchant in Wigtoune and Hurting him"

(Pitcairn, 1833, vol.1 p.91, date 1513), or

"Patrick Mure, permitted to compound for art and part of the oppression done to Betoun McKevin, spouse of Gilbert Mcke"; and also "for the oppression done to Mr Richard Akinhede, Vicar of

Wigtoune, breaking the doors of his chambers, and keeping him furth thereof" (Pitcairn, 1833 vol.1 p.91, date 1513).

In both these above cases "Sir Alexander McCulloch of Mytoun, "became surety to satisfy the parties".

At the same court (Wigtoune), Patrick Agnew, the Sheriff of Wigtoune, with others, was "convicted of art and part of Convocation of the lieges with warlike arms, ...contrary to the Acts of Parliament, and of the oppression done to Sir David Kenneydy, Knight, coming to Leswalt, and hindering him from holding his court - each of them fined ten merks and the Sheriff became surety for himself and the others" (Pitcairn, 1883, vol.1 p.91).

Compounding was often tied to remission. For example, at Selkirk, on November 28th 1502, Walter Scot was "permitted to compound, under a remission, for art and part of the Theft of four score sheep, priced each 5/-". The same Walter Scot, was "permitted to compound under another remission, ...for the Theft of three score sheep from the Abbot of Kelso". One James Scot stood surety as well (Pitcairn, 1833, vol.1 p.38). Amercement was allowed also in more serious cases; for example, at Jedworthe on November 17th 1493, William Tayt and Robert Burne, "his cousin-german" came in the King's will for art and part of the forethought felony done to Thomas Young, by way of murder... And also, for Stouthief of a horse, a saddle, a bow, with a satchel and purse and £20 being in the said purse". Each was "amerciaded in £40, and Sir Robert Ker, "became surety" (Pitcairn, 1833, vol.1 p.17). Similarly, in Lauder in the same year, "John Spottiswode, junior, and Robert Steill came in the King's will for the forethought felony done to James Weddale of Blyth". They were "amerciaded £3 for each". The Laird of

Spottiswood became "cautioner to satisfy the parties" (Pitcairn, *ibid.* p.16).

Many more examples of such cases could be extracted from the records of this period (vol.1-1488-1564). Compounding involved making an offer, especially, presumably, when it was tied to remission. Amercement, if it followed the English pattern, described in detail by Fox, also involved some elements of negotiation. The process worked this way. The offender was amerced by the court - that is lay in its mercy - and a hypothetical sum of money was levied. The sum was hypothetical because the next stage in the procedure was for a group of the offender's peers to meet at the end of each ayre and they decided the actual sum to be paid. The individuals who made up the group were known as "afferrors" and they, supposedly, made their judgement on the basis of their knowledge of the offender, the victim, the circumstances of the case and so on. Hence, the term amercement referred to the "laying in mercy" rather than the actual sum paid.

As noted, Fox argues that by the late fifteenth and early sixteenth centuries the distinction he sees to have existed between amercement and fining had become blurred and, thus, one term was substituted for the other. The Scots evidence on the matter is equivocal. When the term amercement is used, it does not seem to refer to the process of "afferring" that Fox describes. The process seems rather simpler and much more direct. But as most of the evidence I have used is extracted from fifteenth and sixteenth century documents, the interchangeability of the various terms ought anyway to be expected, if we accept what Fox says.

The money raised by these penalties normally went both to the Sovereign and to the victim. It also commonly went to the local burgh for particular purposes. Craig (1732), includes the revenue from fines amongst the King's inter-regalia. He argues, the money was part of the King's "fisc" or personal purse. But the prevalent practice seems to have been that the money was split several ways; certainly part did go to the King, but also part went to the victim or surviving relatives, and part also went via the fiscal to the local court. Also informers could be given a "fee" for providing information. As time went on, the pattern of distributing payments appears to have changed. Certainly, as the granting of remissions came under fire, less could be put to this purpose. And as compounding and assythment were tied to remission, the less the latter could be given, the less was the interest in pursuing crime by these methods. However, Hume, several hundred years later, still saw it as proper that part of the money should go to the victim as solatium (Hume, 1844 p.21). Thus, the idea that the complete sum of money ought to go to the exchequer, appears not to have been finalised until, at the earliest, the nineteenth century.

The details of the Scottish situation are important and interesting and warrant much more attention than can be paid to them within the confines of this chapter. But enough has been said, it is submitted, to bear out the main points of my argument. Various monetary penalties were used extensively in the medieval system, and their use took place in a broad context of compromise and negotiation. These penalties were not restricted to the lesser offences and crimes, but also regularly used for slaughter, theft and rape (see case of Mary Clerk and John Sterling; Argyll Justiciary Records p.503). In this

sense, they were a general sanction. And if we add to them the use made of assythment as a way of avoiding prosecution - even in the case of murder - and the lodging of cautionary bonds to achieve the same, it can be seen that money played a central role in the system. However, it should be remembered that the court records are only the tip of the iceberg. Priority was given to keeping disagreements out of the court as far as possible, not least, because both parties could face amercements and fines. This practice was not restricted to Scotland. Nicole Castan provides detailed and convincing evidence that the same process was at work in the Languedoc during the Ancien Régime. The emphasis was on arbitration at each and every stage (Castan, 1983 pp.219-260; see also Sharpe, 1983 p..167-187).

These general conclusions are supported by MacTaggart in his study of the decisions of Scots criminal courts between 1400-1747. He examines records for all types of court from the Justiciary Court to the Burgh Court, and thereby builds up a detailed picture of actual "sentencing" practice during the period. His conclusions are worth quoting.

"Taken overall, fining was the most frequent sentence of all, although it was relatively infrequent in the justiciary courts. ...the lower courts all show that fining was their basic sentence and the amounts seldom exceeded £100, the usual amounts being between £10 and £50" (MacTaggart, 1968 p.581).

Several comments need to be made. First, we must place this conclusion in its proper context. MacTaggart is describing just the results of those cases that came to court. He thus excludes from his analysis the use of pre-court settlement; also, he fails to consider

the full significance of assythment. However, and second, there is a remarkable resemblance between the medieval and early modern "sanctioning structure" and the present day one, schematically outlined in the last chapter and given a much fuller description in the next. In the lower courts the fine was the most common sanction then and is now; in the higher courts, bodily punishments prevail. MacTaggart, however, does also point out that it is easy to "over-emphasise" the frequency of death sentences in the justiciary courts, demonstrating that there were many "non-capital sanctions including fines" (MacTaggart, 1968 p.580). The other non-capital sanctions used were banishment from the realm, putting to the horn (outlawing) and a limited use of imprisonment. In each of these, the goods of the offender were also escheat to the Crown.

The resemblances between the medieval sanctioning structure and the contemporary one, however, hide much that is different. To use terms discussed earlier, whereas the structure of the modern system is organised partly around the estrangement of punishment from money, there was no such clear estrangement in the medieval system. As has been shown, money was regularly used to deal with the most serious of crimes; the practice of assythment is evidence of this, as is the use of compounding and bonds of caution. Further evidence of the use of money to deal with those crimes where now the fine would be seen as inappropriate, is provided in the treatise by Lord Pitmedden entitled, "Of Mutilation and Demembration and their Punishments" (1699), first published as an appendix to one of the editions of MacKenzie.

Pitmedden describes in great, and sometimes very gory, detail the use of "pecunial" punishments in response to bodily injuries criminally

committed. The treatise considers the principles upon which a judge may award such "pecunial" penalties. Of particular interest is his discussion of what he calls the arbitrary powers of the judge. By this he refers to those situations in which the judge had discretion to adjust the penalty both to the seriousness of the crime and to the particular features of each case. For example, he argues that, if a tradesman with a family loses an arm, eye or leg essential to trade, then the penalty awarded must be increased. According to Pitmedden, this indicates the operation of the principle of "natural equity" in assessing punishment.

The treatise is a long, involved work, and full of examples of the use of money in this type of case. By modern criteria, many of the actual cases he discusses would be judged as delictual rather than criminal. However, Pitmedden is describing a well-entrenched Scots practice, and tries to justify it according to "ancient principle". It is a description of practice in the criminal law of medieval and early modern Scotland. It is evidence of the degree to which punishment and money were brought together in circumstances, where today, in criminal law, they would be kept apart.

All of this does suggest that the estrangement we argue exists in the modern system, did not occur in the medieval one. It would be easy to conclude from this, that medieval people placed much less value on human life and upon the individual than we do now. Scholars, such as Lawrence Stone, have implicitly suggested this, in claiming that early modern England was five times more violent than it is today (Stone, 1983 pp.22-23; see also Stone, 1977 *passim*). The same theme runs explicitly though Norbet Elias's magnificent "The Civilising Process"

and Spierenberg's analysis, using Elias's framework, understandably draws the same broad conclusion (Elias, 1982; Spierenberg, 1985). Simmel puts the same argument rather differently. In the section on Wergild (compounding for murder). Simmel contends that a monetary settlement was acceptable to the kin, because there existed what he calls, a "utilitarian valuation of the human being". In other words, the value of a person was judged according to the "function" - economic, military etc. - that he or she served for the group. He acknowledges, of course, that this was influenced also by notions of status and honour, but he sees this as qualifying rather than destroying his argument (Simmel, 1978 pp.355-357).

These are strong and convincing arguments, though it should be noted that they have not gone unchallenged (see, for example, Macfarlane, 1981 for challenge to Stone). However, they need to be put in the broader context of a countervailing belief system that underpinned medieval conceptions of the proper place of law and punishment. This countervailing set of beliefs were those associated with the Catholic Church. Not only did the Church, for example, prevail against violence and feuds and offer sanctuary to offenders (benefit of clergy included), but its theology was disseminated more widely through a complex notion that historians now refer to as "love before law". The core of this doctrine can be summed up in this proposition from the "Leges Henrici Primi": "Pactum legem vincit et amor iudicium" (Agreement prevails over law and love over judgement) (see Clanchy, 1983 pp.47-67).

This doctrine ~~was~~^{was} all important. Its essential message was that man's christian duty is to settle all arguments amicably and peacefully

without recourse to law. The Christian person expresses Christian love by forgiveness, not by endeavouring to see another punished. In this scheme, recourse to law marks a failure. As Clanchy puts it, quoting the "Leges",

"Agreement (pactum) or peace (pax) is good and even better is "to proceed by love (per amorem), if the parties wish to have the perfect freedom of friends to come and go" (Clanchy, 1983 p.47).

The idea of love here is not the romantic notion tied to sexuality or its voluntary denial. Rather, it is , "a bond of affection, established by public undertakings before witnesses" (Clanchy, *ibid.* p.47); "we offer love only to those whom we cannot do without" (Clanchy, *ibid.* p.48, quoting "Leges"). Clanchy argues, medieval, feudal relationships were founded on this idea of love. In the Scottish context, the most explicit manifestation of it was the bonds of manrent (Wormald, 1986). These were pacts voluntary entered into, and they entailed an exchange of duties and obligations. The feudal superior was to come to the defence of his people and, in return, they were to offer services, including military ones.

One duty owed by the feudal superior to his people was to help them when in trouble with the law. Hence, in many of the examples quoted earlier, it is probable, that it was the feudal lord who "stood surety".¹¹ But there was a much deeper way that Catholic theology influenced law. As Bossy notes, the medieval theory of salvation was premised upon the idea of what he calls "retributive compensations" (Bossy, 1985 p.4). That is, the relationship between Man and God was analogised to a state of debt. Man entered in God's debt by offending

Him (Adam and Eve disobeyed God in the Garden of Eden). This debt could only be paid back by Man offering to God a "retributive compensation" equal in worth. Once paid, this removed the offence and restored the original relationship. Man, thus, could be saved by offering to those, whom he had offended, a valued object.

If we put together the doctrine of "love before law" with this idea of christian salvation, it can be seen that they offered a justification of monetary settlements. In making an offer of money, in giving up something valued, an individual was acting in a Christian way. Christian duty obliged the making of these "retributive compensations".

This, of course, is a very idealised view of the matter. However, my point is, that as well as the material factors - such as the decentralised legal system, the importance of kin, the balance of power between Sovereign and locality - which encouraged negotiation and compensation, they were also justified in the highest of terms. They were acts of Christian conscience and duty.

There are some points that need to be made in qualification. First, the whole process, of course, was made easier, if you were rich rather than poor. But, the "pur" could make their compensations by payment in labour or by the performance of other services (see Johnston, 1974 pp.92-94 and 100-107). Second, if the above account seems to play down the use of violence, the physical bodily punishments, this is partly deliberate and partly justified. It is deliberate in as much as other accounts of the medieval legal system do the opposite; they exaggerate or misunderstand the nature of medieval law and punishment. The conceptualisation of punishment in terms of

power, we looked at in the first chapter, seems to have diverted attention from this other view of the system. The accounts of punishment we studied in chapter I have concentrated on the vertical, hierarchical power relationship. My description has endeavoured to explore the horizontal and lateral ones as well. It is justified, because it seems that in the Scottish system the harsher bodily punishments were quite rare. This is a theme picked up by Hume in his "Commentaries". He observes that "our judges" have never "been in the use of dooming to imprisonment for these long terms of four to five years, of which instances sometimes happen in the practice of England" (P.471).

MacTaggart makes the same point. The Scots system seems not to have been as harsh as the English one. Further evidence for this view is provided by the letters of Edward Topham, an English army officer, who came to Edinburgh after the Jacobite risings. He wrote, for example, "The penal Laws of Scotland are highly remarkable for their lenity" (1776 p.286). He continues, "They have no 'Black Act' as in England" (p.288). Or again,

"It is an honour, in my opinion, to the Laws of Scotland, that in judging on this crime [robbery], they are so lenient; and the equitable consequences that flow from it, are a convincing proof, that is as good in fact as in theory" (p.292).

So, how can we conceive of the medieval Scottish system? Simply to call it a system of "compensation" is too simple, if by that one has in mind the legal notion of compensation as being distinct from punishment. The term Bossy uses of "retributive compensation" is more helpful, because it makes the point that in compensating one also did

penance. In her book on witchcraft, Christina Larner uses the term "restorative justice" to describe the system (Larner, 1981 pp.53-59). This is a useful concept, because it makes the point that the punitive and the compensatory were not opposed conceptually and were not opposed in practice. Punishment and money were not estranged.

IV

In Scotland, elements of this system of "restorative justice" stayed in place until the middle of the eighteenth century. Perhaps the date which symbolises its passing is 1747. In that year was enacted an Act abolishing all heritable jurisdictions; as these were intimately tied to the earlier system we have described, their passing marks the end of the old practices. The 1747 Act was imposed by the English colonial power using the Jacobite risings as the immediate excuse. David Hume, the philosopher, (and uncle of the criminal lawyer), saw the demise of the franchise courts as an indication that traditional Scottish social structure was changing. The abolition of these jurisdictions disturbed the harmonious structure of Scots society by removing from power the "middling orders"; the gentry who, according to Hume, were essential to a balanced polity (see Forbes, 1975 p179). However, the system had been under attack for at least one hundred and fifty years already. The reign of James VI and I marks a transition point between the old and the new.

In the seventeenth century much had started to change. Feuding - a traditional way of settling disputes - was under attack. A new force was present with the use of public prosecution. Established in 1587,

the King's, later the Lord Advocate first proceeded with, then gradually without, the permission of the pursuer. Private prosecutions became rarer as a consequence. As has been mentioned, the granting of remissions was increasingly frowned upon, indeed it was considered as a scandal. In 1649 an Act was passed, which declared all remissions null (Wormald, 1983 pp.138-140). By that time, assythment - an action which, as we have argued, tells one so much about the older system and its supporting legal and social structure - was almost entirely a matter for the courts. Also, the Sovereign had now gone; henceforth, it was to be a period of absentee Kingship and this decisively shifted power to London and to English ways.

The eighteenth century saw equally far reaching changes. As well as the abolition of the franchise courts, whole new divisions of law were opened up and developed. An increasingly distinct law of delict separated itself from the older notions of harm. No longer was all killing necessarily criminal (see Black, 1975 passim). As was mentioned, within the criminal law, "dole"^{12.} or the "subjective element" entered in, and new forms of reasoning about the nature of crime emerged. One indication of this is the increasingly complex classificatory schemes that were applied to criminal law. The early practice of classifying criminal law had been simple. Crimes were classified according to the punishment they received. Hence, in MacKenzie crimes are either capital, pecuniary or arbitrary. However, in the eighteenth century new, more ambitious, wider-ranging schemes emerged. One line of development is tied to the natural jurisprudence of Smith and Millar, another, to the much more concrete and practical thinking of David Hume (the nephew and criminal lawyer). While Millar

endeavoured to elaborate a classification consistent with the philosophy of his master, Adam Smith, Hume, interestingly, breaks the pattern. Although he was a pupil of Millar's, he evolved a classificatory scheme, which, he claimed, reflected the practical workings of the criminal court. His classification, he argued, was based on those crimes a working lawyer was most likely to meet in practice (Hume, 1844 intro). It places crimes against the person at the top of the list, followed by property crimes; the scheme is very "modern" (much of the above is based on an unpublished paper by J.Cairns, 1987).

More narrowly, in the area of monetary sanctions, the situation is transformed. "Compounding" had disappeared; assythment still existed but, as was said, was now the business of the criminal court alone. And, if we follow Fox (1927), one no longer "made fine", but "was fined". Fox argues, that in England, during the late sixteenth and early seventeenth century, a "quiet revolution" took place. In the High Court, Coke dropped the older expression of "making fine" and substituted a new expression, "to be fined". According to Fox, Coke was copying "Star Chamber type" tactics; he was abrogating a right to make fine and imposing a new measure, that allowed no negotiation. The expression "to be fined" is the result of this. Thereafter, Fox argues, the change went unnoticed. Blackstone, for example, repeats Coke's new expression without comment; the idea of being fined was absorbed into legal knowledge (Fox, 1927 pp.197-201).

It is beyond the scope of this chapter, indeed of this thesis, to give a detailed description, let alone explanation, of why these changes happened. As was said in the introduction to this chapter, it is not intended to be a "history of punishment through the ages". Yet, what has been said above, indicates the dimensions of such a task. One has to contend with fundamental changes in the law and legal system and in the organisation of the "state". To these have to be added another major social upheaval. Earlier we argued that the system of restorative justice was underwritten by medieval catholic theology; the emerging modern one, however, was underwritten by the theology of the reformation. As Bossy argues, the reformation put forward a new theology, containing a new theory of salvation, which challenged the older ideas. It claimed that knowledge of salvation on earth was not possible; it delayed the certainty of salvation until after death. This caused a great "moralisation" of behaviour to take place. Crimes became seen as sins, and sins were now to be punished rather than forgiven. A new image of God as a wrathful judge emerges. From now on, "compensation", as an expression of "love", was inadequate. It could no longer serve the dual purpose of restoring relationships and being a penance. Wrong doings must be met by pain; those who cause suffering, must suffer in return (Bossy, 1985 pp.91-94).¹³

In Scotland, this message was transmitted through the system of kirk sessions, at the parish level, and in the general assembly, at the national level. This disturbed the traditional social hierarchy, as it was lairds and burgesses, not the nobles, who sat on the church courts

(Wormald, 1983 p.141). The church courts were concerned with morals. They rooted out the intimate details of sexual life, and exposed the "fallen" to public condemnation - a true form of Foucauldian disciplining. The courts dealt with issues such as fornication, adultery, drunkenness, breaches of the Sabbath, and slander. For sexual offences, the guilty had to appear for a number of Sundays before the congregation to be rebuked on the "stool of repentance". Also fines could be imposed; for example, £5 for a single fornication, £10 for a repeat, up to a maximum of £40. Fines were also imposed for breaches of the Sabbath, drunkenness, and slander (Davies, 1980 pp.127-129).

The great moralising of the reformed¹⁴ church thus affected traditional values in both theory and practice. In theory, it placed individuals directly before God, with no intermediary to forgive them for their sins; personal conscience, the acceptance of responsibility for actions, guilt at wrong doing, replaced the older ideas of "love". While the doctrine of "love before law" may have seen "agreement to prevail over law, and love over judgement", the new moral order saw it differently. Now, reconciliation was not the point, but obedience to authority was (see Bossy, 1985 p.94 and Brown, 1986 chapter 7). Judgement was the new order of the day.

The rise of protestantism had a dual effect on conceptions of moral behaviour and, thus, on the role law and punishment played in society. It made the individual more free; as Mauss notes, the protestant dissenting sects of the seventeenth century were importantly related to the emergence of the idea of individuals as being inalienably free, subject only to God (Mauss, 1985 p.21). But protestantism also tied the individual into a new web of guilt and

consciousness of self. This dual relationship underlies what Simmel refers to as the growing "spiritualisation" of the individual.

Increasingly, the individual becomes the point of reference. No price could be put on the uniqueness of each soul; so, to offer payment in money was no longer adequate. Because it became thus impossible to make amends for harm done, the offender had to be punished. Punishment and money become estranged.

The relationship between these changes in morality, conception of individuality and the law and legal institutions, is an issue of immense complexity, and I do not pretend my description is anywhere near full enough. This is an area that warrants much further research. Nevertheless, what I have tried to show, is that law now existed in a very different "moral world" than it once did. This new moral world set a new context for the operation of legal institutions. Indeed, legal institutions, including punishment, became part of the process, by which these new ideas became influential and legitimate. The increasingly public quality of law - following the demise of the "private", heritable jurisdictions and of negotiated justice - was central to the legitimization of the emerging social order. To use Elias's concept, the "civilising process" stressed the need for the individual to practise self-control and restraint; to be more "private" and not to depend on "public" relationships for moral sustenance. The boundary line circumscribing the individual in moral space had been significantly redrawn.

The changes that occurred in the Scottish legal system after 1747 can be described in Weberian terms. It became more rationalised and more bureaucratic. The abolition of the heritable jurisdictions effectively separated the ownership and control of the means of administration of justice. Those who once "owned" the court, were no longer able to control its business. Rather, justice was now controlled from Edinburgh. Legally qualified personnel were sent into the localities, and this further disturbed traditional patterns of authority. Now the Sheriff was a stranger; a qualified lawyer, whose commitment to local issues could not be assumed. The 1747 Act required the Sheriff and the Sheriff depute to be advocates of at least three years standing. Also the Sheriff was now to be paid a salary. "Justice" was becoming more distant from established local relationships.

The 1747 Act laid the foundation to the modern court structure. The new system was streamlined and consisted essentially of the Burgh and J.P.'s court, at the bottom of the hierarchy, the Sheriff court, in the middle, handling the vast majority of criminal work, and the High Court, at the top. The values of an increasingly rationalistic law thus were applied to crime by fully qualified lawyers; the system on the whole became increasingly legalistic.

The growing bureaucratic nature of the criminal justice system was evident also in the reorganisation of other court officials. The fiscal changed from being an agent of the Sheriff, originally responsible for collecting fines and fees, into an independent prosecution service. Although these changes began earlier, it was not until 1876 that all

fiscals were placed on a salary, and in 1907 the right to appoint them was vested in the Lord Advocate. The final centralisation of the prosecution service took place in 1975, when the District Court (Scotland) Act abolished the power of district courts, as they are now known, to appoint their own prosecutors.

Similar streamlining took place in procedure. In particular, a system of summary procedure emerged to be consolidated in the 1908 Summary Jurisdiction (Scotland) Act. The classificatory schemes used to record criminal statistics also became rationalised. In 1837, the "miscellaneous" class of offences (then Class VI) includes Hamesucken, smuggling, assembly armed and to aid smugglers, conspiracy to raise the rate of wages, deerstealing, indecent exposure. Being out armed at night to take game, taking and destroying fish in enclosed ward, and so on. The only recognisably "modern" offence is "Riot and Breach of Peace".

In the last decade of the nineteenth century a series of acts were passed directly aimed at regulating the administration of the fine. For example, 1881 Summary Jurisdiction (Scotland) Act introduced for the first time a "default table", that set out in detail, how long a defaulter was to be imprisoned. Before this, the relationship between time spent in the prison and non-payment of a fine seems to have been determined by the seriousness of the crime committed. Although, of course, the "default table" reflects this too, it does so indirectly. The new scheme was supposed to be comprehensive and applicable without assessment being made of the seriousness of the original offence.

The effect of all these changes on the use of monetary sanctions was profound. The "moral universe" which justified their use had been

challenged, if not shattered; the associated legal and social structure had disappeared. As a result, it could no longer be used in these circumstances where a serious harm had been done. Individuals could no longer hope to restore relationships and do penance as well. The growing bureaucratic nature of the increasingly formally legal system did not recognise negotiation in criminal matters. Monetary sanctions, thus, were downgraded as a result. It would be wrong to conclude that the prison simply arose to take the place of these older practices. As we saw, commentators saw Scotland as having a very lenient penal system in the eighteenth century. Indeed, at least one famous visitor saw Scotland as a very moral society. John Howard, after visiting Scotland between 1779 and 1783, he wrote,

"There are in Scotland but few prisons; this is partly owing to the shame and disgrace annexed to imprisonment; partly to the solemn manner in which oaths are administered, and trials and executions conducted; and partly to the general sobriety of manners produced by the care which parents and ministers take to instruct the rising generation" (Howard, 1929 p.148).

The great "moralisation" of the reformed church apparently met with success. Perhaps, part of the explanation for why there was no "great incarceration" lies in the fact that Scotland did not develop industry until later. But, importantly, the society which sustained the use of money to deal with the full range of crimes had disappeared. Punishment now had a very different moral basis. Thus, we learn from Hume that the fine is now too "mild a corrective" to apply to "so base a character" as a thief (Hume, 1844 p.475). The 1864 Summary Procedure (Scotland) Act distinguished between civil law and criminal law in

terms of those acts which are imprisonable. All this suggests that by the middle decades of the nineteenth century the prison had come to be closely associated with the idea of the "truly" criminal and thus also with the idea of "proper" punishment. With the exception of assaults, especially if they were mitigated by drink, crimes against the person would now result in imprisonment or in transportation. The fine was associated with the lesser crimes and the burgeoning minor offences. As we shall see, in the next chapter, this pattern of sanctioning began to change quite quickly. From the end of the nineteenth century the fine again creeps up the scale to be used in the property crimes once more. But, the important change had taken place; the relationship between the fine and the idea of "true" punishment had been broken.

VII

My point in relating the above details is to give some idea of the transformations that have taken place in the Scottish criminal justice system. The account is neither full nor complete and, as said, I make no such claims for it. Much of the story I have told will be familiar enough to scholars in the area, although, hopefully, some may find the specifically Scottish information new and useful. Moreover, scholars will probably evince no surprise at the "broad categories" of cause I have identified; but again, I would claim some credit for endeavouring to point to the importance of generalised religious beliefs. As Larner (1981) argues, organised religion was the first "political ideology". It provided a comprehensive belief system, which governed the totality

of life and thus was the backdrop to changes in law and conceptions of punishment.

But there are ways, in which the story told is a new one. Most importantly, it shows that money has played a significant part in penal relations, and I have advanced reasons for why this is so. The medieval Scots system allowed the use of money for all kinds of crimes and offences in a way that is not true of the present system. Some of the ways money was used, seem not to be very closely related to our modern conception of punishment, but it would be quite wrong to exclude them from the analysis. Processes like assythment, compounding, the lodging of bonds etc, were recognised as legitimate ways of dealing with crime. They may not be punishments from our point of view, but perhaps we should pause and question, whether we should use our modern ideas as criteria by which to describe the past. Of course, to some extent we must, but this does not mean that we are incapable of seeing their limitations. If the story I have told is accepted, it does have implications for the sociology of punishment. As we saw in chapter 1, the modern discipline makes little room for deprivation of money in its theories. It excludes them conceptually and empirically or, if notice is taken, then they are pushed to the sidelines, so that the "proper" story of punishment can be told. The subject matter of this "proper story" is the bodily punishments. If the general picture I have painted of the medieval system has any accuracy, then perhaps it is time for sociologists to think again.

In broad historical terms, the pattern of change I see as occurring, is this. We have moved from one system, in which money was the most common sanction, to another system, in which the same is true.

On the surface, this is not a very interesting story, but if we dig below this layer, then we find the systems work on very different principles. In the medieval system there appears to have been no estrangement of punishment and money; in the contemporary system this estrangement is central. This, of course, means that money enters into penal relations in different ways; that a new relationship has been drawn between punishment, money and legal order.

I propose, in the light of my analysis, that we must revise both the view of earlier systems of punishment implicit in the literature and its portrayal of penal change. The medieval system was not based only or even primarily on the use of the blood sanctions. At least in Scotland, it appears to have been a rather lenient system, in which people negotiated settlements. Corporal punishments were used, but not to the extent that the literature implies. Also, it appears much more difficult to tie particular sanctions just to a particular mode of production. Rusche and Kirchheimer, for example, claim that the fine was not a general penal sanction in the pre-modern system. My analysis questions this - especially, if we broaden our sight and look at other monetary sanctions as well as the fine. Rusche and Kirchheimer further suggest that it is only in capitalism, that the fine can become a general sanction, because it is only capitalist society that is fully monetised. Again, my analysis questions how far this view can be maintained; there appears to be no inevitable or unique relationship between capitalism and the use of the fine. Perhaps, what we earlier described as the "rupture" view of penal history, needs to be looked at again. Perhaps, enough has been said to make sociologists think again about the assumption of discontinuity with which they work. Why should

it be accepted that history is best described as a series of leaps and bounds? Is it not time to start exploring "continuity" in change, rather than assuming the opposite?

Clearly, the picture I have painted describes a legal system that has undergone far reaching changes. But the process of change portrayed was slow. The Weberian thesis of gradual rationalisation has much to recommend it. That this characterises patterns of change rather than explaining them, is accepted. This may, however, be all that we can do at this stage. My analysis of the changing relationship between punishment, money and legal order, in my view, suggests it is.

PART TWO

General Introduction

In the next four chapters, we explore the place of the fine in the modern criminal justice system in Scotland. The empirical focus of the inquiry turns from the broad themes considered in the previous chapters and centres on the use made of the fine by the criminal courts, particularly the sheriff criminal court, which has been and arguably still is, the busiest and thus the main criminal court in Scotland. Although our inquiry thereby becomes more specific and concrete, the more general questions of the nature of rationality, and of the rationalism which we claim to be an emergent feature of the criminal justice system, are not dropped or put to one side. Rather, the following chapters can be seen as a continuation of the story by different empirical means. Our aim is to build up what Geertz (1973) has called a "thick description" of the system, albeit by using a wider range of methods than the ethnographic ones on which he rests his particular inquiries.

The next chapter analyses official statistical data recording the use of sanctions from 1897 to 1978. As is explained, these dates mark the introduction of a comprehensive recording system and a major change in classificatory schemes. Broadly speaking, between these two dates the same classification for recording statistics was used. Thereafter a new scheme has been introduced which makes strict comparison difficult; also, the publication of data in Scotland since 1978 has been, to say the least, fraught with difficulties. The only

figures which can be used with safety since 1978 which compare to the system of recording prior to that date are those for 'all crimes and offences' and for the 'miscellaneous' and 'motor vehicle offences'. If we briefly examine the figures for all crimes and offences it can be seen that the same general pattern of sanctioning continues. In 1983, the fine was used in 81% of cases, all forms of detention in 6.03%, admonitions in 9.8%, probation orders in 1.22%. If we add to the figure for fines, those for compensation orders (1,050), introduced by the 1980 Criminal Justice (Scotland) Act, the total figure for monetary sanction in 1983 was 81.6%. The corresponding figure just for fines in 1978 was 83.1%. Given the time span over which we examine figures, it is still too early to say whether the slight decrease in the use of monetary sanctions indicates a substantial new development.

We have focused on the use made of fines by the criminal court for a number of reasons. First, as we argued in chapter one, the fine has been and is a relatively "invisible" sanction and thus there exists little primary material on it other than the actual use courts have made of it. There have been very few general inquiries, governmental or otherwise, concerning the fine. We do not have the rich source of primary material on the fine that exists, for example, on the prison or methods of treatment. There are a few inquiries such as the Wootton Committee (1970), the Report of the Scottish Council on Crime (1975), the Dunpark Report (1977) and the Report of the Stewart Committee (1983), but not much else. These documents form an assumed backcloth to the following chapters.

There is another reason we have focused on the use made of the

fine by the criminal courts. We reason that the "proof" of the thesis so far argued ought anyway to be borne out in the day-to-day activities of the criminal justice system. Of all the sanctions available, it is the fine, this mundane, routine, non-dramatic sanction, that warrants study at this concrete level. It is data on the day-to-day use of the fine that constitutes the "hard-end" of our argument and inquiry. This strategy has meant paying focal attention to the issue of sentencing and sentencing practice; have there been changes in sentencing practice during the period of study? What factors explain the use made of the fine by sentencers? What relevance does the administrative framework of the system have to the use of the fine? These are the sort of questions that constitute the topic of this part of the thesis.

We begin by looking generally at the use of sanctions by the criminal courts in the period 1897-1978. The following chapter provides information on the use of sanctions and also continues the narrative. One issue explored is whether changes in the volume of different types of crime appearing before the criminal court can help explain changes in the use of sanctions. The next chapter certainly describes such changes in the former but it is argued also that we should be cautious in describing the relationship these have with the latter. We then turn to the issue of how and why sentencers use the fine today. The point is to try and understand and describe the process which underlies sheriffs' use of the fine. This is an important question because before any sanction can be used a decision has to be made by a sentencer. Together these decisions build up into the sanctioning structure, they constitute its shape and profile.

Hence understanding how and why sentencing decisions are made has an obvious importance and relevance. This part of the argument uses data generated by interviews conducted with sheriffs in three cities. As is said, the interviews were normally tape recorded; twenty-two interviews took place. Although no attempt was made to draw up a sample of sheriffs, it is useful to know that approximately 10% of sheriffs were thereby contacted. In the two chapters on the sheriff interviews, the concern with rationality, the complex interplay between substantive and formal rational reasoning, is examined. The fourth chapter looks at the issue of default both as a matter of policy and in the context of a discussion about coercion and voluntariness. This takes up our earlier argument concerning the fine as a "voluntary" sanction.

This part of our inquiry thus endeavours to explore the relationship between punishment, money and legal order by focused, concrete empirical inquiry and uses a variety of techniques to that end. That this displays an eclectic, even catholic, attitude towards the problem of methodology is true, but that this catholicism is a weakness is debatable and to be decided, at least in part, by the plausibility of the argument that follows.

The Structure of Sanctions and theUse of the Fine 1897-1978

My objective in this chapter is to provide a broad statistical description of changes in the use of the fine in the last 85 years from 1897-1978. The earlier date is the first occasion on which comprehensive figures for all crimes and offences and for all procedures were given and the latter date marks the end of the general classificatory scheme used; from 1978, a new classification has been in use. Also, we will present figures which record developments in the patterns of other sanctions, especially the use of detention and admonitions. Our purpose in reviewing these statistics is threefold. First, in the broadest sense, it allows one to perceive the fine in the context of the other sanctions available to sentencers. This is important because, without comparative knowledge, one lacks any clear idea of how and in what ways the fine has become the most common of penal sanctions. Secondly, as the figures we use are based upon official data, they can be taken to represent the outcomes of judicial decisions. The figures are a record of the actual use made of different sanctions by sentencers, and can be seen as a first stage in the explanation of sentencing patterns: they are a point at which to begin to understand how and why sentencers make decisions. If this is so, it follows that this data indicates the absence or presence of general sentencing policies. Thirdly, these figures may be taken as a reasonable basis upon which to assess likely future policy directions in the use of sanctions. The figures record 85 years of

sentencing practice and hence are invaluable as a source upon which the rational appraisal of developments can be based.

I am conscious that this exercise is no more than the first stage in the process of explaining sentencers' decision-making. The figures can be used only as a basis upon which to raise certain questions and issues that may be important in an explanatory account. In this context, they provide the background to the next chapter in which we describe the legal reasoning of the group of sheriffs we interviewed.

The methodological limitations of the statistics we use are the same as apply to any official data. Official statistics, it is said, measure more the means of their own production than they record accurately the state of the objects they purport to represent (see, for example, Kitsuse and Cicourel¹⁹⁶³). While this may be an issue of considerable importance in the official statistics on crime - and here we think in particular of the debate about the dark figure of crime - that such problems do not affect the data we use. These data, extracted from the annually published volumes, entitled first the 'judicial' and then the 'criminal' statistics, amongst other things record the activities and workings of the various courts in the jurisdiction. They provide figures on the number of people against whom a charge is made, against whom a charge is proved, and they also describe the outcome in terms of disposal. Hence, unlike the official statistics on registered crime, these figures can record nothing other than that which happens in the criminal judicial process. Unlike the statistics on crime, there exists no other possible "reality" against which to measure their accuracy. The statistics can only represent a

limited range of actions and decisions; therefore they are a reasonable and solid foundation upon which to proceed.

There are, however, some methodological choices to be made about how to use these statistics. It is important to distinguish between figures recording the number of offenders against whom a charge was brought (the commitment figure) and those which record the number against whom a charge was proved. The first can be viewed as a pre-trial measurement, the latter as a post-trial one, even if the vast number of pleas, especially in class VII (miscellaneous) offences, are guilty pleas. It is fairly obvious also that the latter measures a smaller population than the former for a number of reasons - verdicts of not guilty or not proven, the prosecution or police withdrawing the charge on evidential grounds, etc. Given that we wish to examine the relationship between disposals and judicial decision-making, it seems logical to use, as our parameter, the total number of offenders against whom a charge has been proved. In each of the tables and graphs given, it is this figure that is used.

There are, of course, a number of other technical matters that affect the way in which data may be interpreted. In particular, the classificatory schemes under which data were originally collated, any shifts or changes in classificatory procedures, or movement of an item from one crime class to another are important.

We indicate in the text where such issues arise. Of special significance for the interpretation of data is the introduction or abandonment of sanctions, as this has an obvious bearing on sentencing practice. Fortunately, this is not a major problem for the period we cover. Statistics recording proceedings in both solemn and summary

procedure were not available until 1897. Before that, data is patchy and tends to under-represent summary proceedings. As the three principle sanctions - fines, imprisonment (and other forms of detention) and admonitions - were already in use at this time, the possible changes resulting from the introduction of new major sanctions has not arisen. Probation was introduced first in the 1881 Probation of First Offenders Act, and consolidated into a national scheme by the 1908 Probation (Scotland) Act. However, probation has not been, and certainly is not today, a major sanction if we judge by its frequency of use. The introduction of Young Offenders Institutions by the 1963 Criminal Justice (Scotland) Act has made some difference to the use of imprisonment. Arguably, in some classes of crime - for example Class III (crimes against property without violence) - it has led to a slight increase in the use of imprisonment, but its effect on the system overall appears to have been limited.

In the tables that follow, descriptions are given of the use of sanctions, first in the case of all crimes and offences, and then individually for a selected number of classes of crimes and offences. The classes studied were selected in two ways: first, we chose those which are numerically the most important; secondly, we selected comparatively - working upon the hypothesis that the fine will be used less in the case of more serious crimes. As a result, Classes I (crimes against the person), II (crimes against property with violence), III (crimes against property without violence), and VII (miscellaneous offences) were chosen for analysis.

Before we begin detailed analysis, there is one other important

methodological consideration. This is whether one should work with figures describing absolute changes in the use of sanctions, or with figures describing proportionate changes in the use of sanctions. This is important because it can significantly alter the general picture which one builds.

Figures recording absolute changes in the use of sanctions record changes in the volume of cases proved and in the volume of sanctions. Now, although there is no simple relationship between these two measures, it would be reasonable to assume that if everything else remains constant, then a volume increase in cases should be matched by a volume increase in sanctions. An obvious difficulty can arise in that the pattern of distribution in the use of sanctions for a particular class of crime or for a particular crime may change over time due to some intervening factor. This could be a reclassification of the basic category over time, or the inclusion of a new item in a crime class, or it could be due to a change in sentencing policy, either promoted by legislative changes, or by judicial discretion.

Statistics recording the proportionate use of a sanction express the frequency of its use as a percentage of the "total of charges proved" figure. This is a measure of the relative use of a disposal. Unlike absolute figures, it is not directly responsive to any change in the total increase in the number of cases proved. What the proportionate figures measure is the relative balance in the use of differing sanctions. Absolute figures thus can hide relative ones. Absolute figures do not directly record the frequency of use of one sanction compared to another. This has important implications. As Bottoms (1983) has argued, it is a mistake to presume that absolute

figures can be used to support a thesis which contends that the volume increase in the use of a sanction is direct evidence of a change in penal policy. Yet this is precisely what many arguments about the penal system do (for example, claiming an increase in the size of the prison population indicates an increased use of the prison as compared to the use made of other sanctions).

Our predeliction thus is to perceive relative figures as a more generally usable measure of the use of sanctions. Proportionate figures record the response of the system to "input", irrespective of absolute increases. However, it is important to appreciate the nature of the volume increase in cases proved, as this is an important indication of "the workload" the penal system has to handle.

In what follows we present both absolute and proportionate figures, the objective being to give a rounded portrait of the use of sanctions. In both cases the figures are described over time.

Our scheme in presenting the data is, first, to construct a general picture of the broad changes that have characterised the penal system during the period, second, to look at changes in the use of the fine and other sanctions within each of the selected classes, and thirdly, to look at changes in the use of sanctions for particular crimes and offences. Finally, we will consider the general implications of the analysis, concentrating in particular on whether we can say there has been a change in sentencing practice.

Volume changes in the classes of crimes and offences

The table below (Table 1) describes the relative contributions of the different classes of crimes and offences made to the overall total of all crimes and offences. We provide figures both for 1897 and 1978.

Table 1

Volume changes in classes of crime: 1897 as compared to 1978

Class	1897 (total against whom charges proved)		1978		% increase or decrease
I	4,830	(4.3%)	3,062	(1.5%)	-36.6%
II	879	(0.78%)	9,362	(4.4%)	+965.1%
III	9,073	(8.0%)	23,569	(11.0%)	+159.8%
VII	93,996	(84.0%)	171,478	(81.0%)	+82.4%
Total	108,778	(96.5%)	207,471	(98.3%)	+90.7%
For all crimes and offences	112,714	(100%)	211,113	(100%)	+87.3%

A number of interesting observations may be made. First, it can be seen that, as the selected classes of crimes and offences together account for 98% of all the crimes and offences for which a charge was proved, they do provide a very full picture of this part of the penal system. Second, the class of crimes, in which there has been a decrease in the number of cases proved, is Class I - crimes against the person - with a 36% decrease.

It is important to realise that it cannot be concluded from this that there has been a significant decline in the volume of serious violent crime with which the courts have to deal. Rather, it can, in part, be explained by the removal of petty assaults (including technical police assaults) from Class I to Class VII in 1901. Given petty assaults normally constitute the greatest proportion of assaults brought before the court, then considerable importance must be attached to this. All other classes have witnessed a major increase in business over the period, especially Class II with a 965% increase. From constituting 0.78% of the total in 1897, it had increased to 4.4% by 1978.

Although, of course, one must be cautious, it does appear reasonable to assume that such a major change is related to volume increases in the amount of violent crime against property during the period.

Third, it is important to note that the contribution of Class VII offences to the overall distribution has decreased during the period. This is a somewhat surprising figure, as it is generally assumed that the significant increase in statutory legislation during this period has had a major effect upon the type of business with which the court has had to deal.

The general picture that emerges from the above table can be thus summarised:

- (a) that, in terms of the volume of cases in which a charge is proved, there has been a decrease in crimes against the person. In 1978 the courts were dealing with less disposals for serious violent crime than in 1897.

- (b) that, in the two property classes - II and III - there have been significant increases in the number of cases. These two classes now constitute a greater part of the volume of business with which the criminal court deals.
- (c) that, while there has been an increase (of 81%) in the total number of Class VII offences in which a charge was proved, this has not increased the contribution of this class to the overall distribution. Thus, while the majority of cases with which the criminal court deals are now, and were in 1897, Class VII, the relative significance of this class has not increased.
- (d) finally, as there has been an overall volume increase of 87%, it is reasonable to relate this to a general increase in the volume of crimes and offences with which the criminal court has now to cope.

Table 2

Changes in the absolute and relative* use of all forms of detention, the fine, admonishments and probation 1897 - 1978

Class	Detention			Fine			Admonishments			Probation		
	1897	1978	% change	1897	1978	% change	1897	1978	% change	1897	1978	% change
I	1,585 (32.80)	1,084 (35.40)	-31.6 (+7.9)	2,843 (58.86)	1,431 (46.73)	-49.7 (-20.6)	303 (6.27)	291 (9.50)	-3.9 (+51.5)	35 (0.72)	193 (6.30)	+451.4 (+77.5)
II	651 (74.06)	3,034 (32.41)	+36.6 (-56.2)	30 (3.41)	4,627 (49.42)	+15323 (+1349.3)	59 (6.71)	991 (10.59)	+1579.6 (+57.8)	86 (9.78)	595 (6.36)	+591.9 (-34.9)
III	3,843 (42.36)	2,881 (12.22)	-24.9 (-71.1)	2,127 (23.44)	16,852 (71.50)	+692.8 (+205.0)	1,806 (19.91)	2,743 (11.63)	+51.8 (-41.6)	862 (9.50)	797 (3.38)	(-7.9) (-64.42)
VII	3,985 (4.24)	3,767 (2.20)	-5.5 (-48.1)	73,039 (77.70)	149,765 (87.34)	+105.0 (+12.4)	16,493 (77.60)	15,780 (9.20)	-4.3 (-47.7)	-	-	-
All	10,329 (9.16)	11,132 (5.27)	+7.8 (-42.5)	80,137 (71.10)	175,352 (83.10)	+118.9 (+16.9)	20,003 (16.10)	20,230 (9.58)	+1.1 (-40.5)	1,230 (1.09)	2,654 (1.30)	+15.8 (+19.3)

* figure in brackets indicate relative use of sanctions.

The use of sanctions

Table 2 describes changes in the use of certain sanctions based upon absolute figures, i.e., those recording total usage of each sanction at each date. The first two columns of each section simply note these totals and the third expresses the difference between them as a percentage of the 1897 figure. Although this is a somewhat general and crude comparison, it does allow us to observe broad changes in the volume of proved cases for each of the selected classes and for all crimes and offences. To further aid comparison, the figures in brackets express the use of the disposal as a percentage of the total number against whom a charge has been proved (the relative figure).

As can be seen from the figures for all crimes and offences, there has been a very significant change in the use of the fine, whereas the change in the use of all forms of detention, as measured by percentage change in the total for all crimes and offences in comparison, has been slight. While the number of sentences of detention have increased by 7.8%, the use of the fine has increased by 118.9%. If this is put in the context of the percentage increase in the total against whom a charge has been proved (in 1897, 112,714; in 1978, 211,113 - percentage increase +87.3%), then it is clear that in general the increase in the fine is disproportionate. If we further observe changes in the use of probation and admonition (15.8 and 1.1 respectively), the pattern of change is highlighted. In general, there has been a major increase in the volume of fines given by the criminal court which, not only exceeds the comparative volume increase in the other recorded sanctions, but also that of the overall increase

in the volume of cases in which it is possible to give any disposal. In short, the fine has picked up the major increase in court business during this period.

This is an important and significant finding in its own right, and later in this chapter we will consider its general implications. At this stage we wish to describe more fully the detailed nature of the changes that have taken place and to draw some provisional conclusions.

The use of detention: volume changes in the different classes

It is clear from Table 2 that there has been uneven developments in the use of detention in the different classes. Whereas, there has been a volume decrease in its use of 31.6%, 24.9% and 5.5% respectively for Classes I, III and VII, there has been, in comparison, a major volume increase in its use in Class II - crimes against property with violence - of 36.6%. This increase is undoubtedly related to the overall increase in the number of cases of Class II crimes that pass through the court. Whereas in 1897 there were 879 cases of a charge proved, in 1978 this had risen to 9,362 - a 965% increase in volume. If these two figures are compared, then it is clear that the increase in the use of detention in Class II has been less than the overall increase in volume for Class II. Thus, if these figures are converted to changes in the relative use of detention, we can, in fact, observe that, relatively speaking, the use of detention has decreased, i.e., the relative use of all forms of detention in Class II has substantially decreased over the period (by -56.2%).

Indeed, this general pattern can be discerned if we look at the use of detention for all classes of crimes and offences. While there has been a slight volume increase in the use of detention of 7.8% in proportional terms, there has been a marked decline of 42.5% over the period. As we argued above, the use of detention has, by our first measure, remained relatively constant, whereas, by our second measure, it has tailed off. Generally, therefore one can conclude that there is a significantly smaller chance today of any case in which a charge has been proved being dealt with by the use of a sentence of detention than there was in 1897. As can be seen from Table 2, this holds true for Classes II (-56.2), III (-71.1) and VII (-48.1) and for all crimes and offences (-42.5), but not for Class I, where there is now a slightly greater chance (+7.9) of detention being used.

The use of the fine: volume changes in the different classes

There have been major changes in the volume use of the fine by the criminal courts during this period. With the exception of Class I crimes, it can be seen from Table 2 that there has been major increases in its use in all other classes. For example, in Class II in 1897, 30 fines were given, compared to 4,627 in 1978, a percentage increase of 15323%. If we compare this rate of increase to that for the total against whom a charge has been proved (from 879 to 9,362, or a percentage increase of 965%), then it is clear that there has been a major shift into fines in this class. Indeed, this picture is confirmed if we look at the relative use of fines for Class II crimes. The percentage figures for 1897 and 1978 are 3.41% and 49.42% respectively, an increase in the proportional use of the fine of

1349.3%. While the dramatic nature of these increases is somewhat highlighted by the small size of figures involved, it is nevertheless clear that there has been a significant increase in the use of the fine for crimes against property with violence.

A similar, though less dramatic, increase has occurred in the other class of property crimes, Class III (crimes against property without violence). The relevant figures for volume changes are for 1897, 2,127, and for 1978, 16,852, a percentage increase of 692.8%; and for proportionate use 23.44% to 71.5%, an increase of 205%.

A shift into the fine is clear also in Class VII - miscellaneous offences. This group of offences is normally seen to have a special significance for the use of the fine. Because it is composed of "regulatory" or "trivial" offences, it is often argued, or more normally tacitly assumed, that it is to this class that one ought primarily to look in order to explain the "rise" in the popularity of the fine. There are, of course, good grounds to this argument: not only is this the class in which the fine is used most (87.34% in 1978), but also this class, as was shown in Table 1, contributes by far the greatest number of cases that appear before the courts. Moreover, as is well known, the majority of offences in Class VII are related to the Road Traffic Acts (80% plus), and the majority of such offenders receive monetary sanctions either as fines or as fixed penalties (90% plus). Indeed, very often it seems to be assumed that the rise in the popularity of the fine parallels the rise of the automobile and to a lesser extent the rise of radio and television.

It is readily admitted that, in crude global terms, this thesis has much to it. However, there are a number of important

qualifications and caveats that must be made. First, as can be seen from Table 2, while the volume increase in business in this class is considerable, there being a rise of 105% over the period, this has had little effect on the proportionate use of the fine; proportionately, the use of the fine has increased by only 12.4%, from 77.7% in 1897 to 87.34% in 1978. It appears reasonable to conclude from this that there has been no major change in sentencing practice in this class in the sense that there has been no major shift or switch from the use of another sanction into the fine. However, there has been a significant change in the type of offence which is predominant in the class and is fined. In the earlier period, from 1897 until the 1920s, the predominant offences fined in order of magnitude were breach of the peace, those falling under police regulations, and drunkenness; from the mid-1920s onwards, there has been a significant increase in offences against the Road Traffic Acts, these reaching a position of dominance, with other statutory offences falling under the Wireless Acts, only after the second world war.

As breach of the peace is a common law crime, and was in this earlier period the most common of all "miscellaneous offences" appearing before the court, it follows that the relationship to be analysed is not just one between the creation of statutory offences and the use of the fine. Rather, there is an underlying issue of why certain "harms" are construed as trivial, or less serious, and so can be put into this class, while others are deemed to be serious and classed elsewhere.

Various explanations have been put forward to account for this process. It is often claimed, for example, that the offences which

are categorised in Class VII have one feature in common. Rather than being aimed at responding to "serious" harm caused to the individual, such as attacks on the person or upon property, these offences are aimed at controlling or managing aspects of daily life. The contrast drawn here, it is important to note, is not one just between seriousness and triviality, but also one between harms that directly impinge upon the individual and those that impinge on routine procedures which lend order to a complex society. (Matters such as the control of traffic, or the need to keep a reasonable level of "peace", or the need to "licence" certain public services (drink), or forms of shared technological communication, or public sex.) As Gusfield (1983) has recently pointed out, there is an important conceptual difference in the way these offences are legally categorised. Whereas, in the case of crimes, a doctrine of *mens rea*, centred upon the legal subject as a right-bearing, responsible individual, is the principle of classification, in the case of offences, the relevant legal category is one more akin to a form of strict liability. The legal subject is no longer the centre of attention (either as victim or offender); now the central calculation is focused upon the harm caused by the act in abstracto.

There is an important point here. The implication of Gusfield's argument is the construction of an action as an "offence" rather than a "crime" is related to broader legal categories as much as it is to a calculation about harm. It is because the classic criminal law relationship between intentionality, proportionality and assessment of harm is absent, or at least marginal, that certain actions become construed as offences. But it would be wrong to conclude from this,

as Gusfield points out, that offences are classed as trivial or less serious only because the classic criminal law relationship is absent. This is relevant and is part of the process, but we ought not to reduce the argument to one of simple cause and effect. Other broader, sociological considerations have to be brought into focus as well, particularly those, as Bottoms (1983) has argued, connected with bureaucracy and changes in technology.

As we contended earlier, the change in the nature of the type of offence which predominates in Class VII is tied in with developments in technology. The emergence of the motor vehicle - which President Woodrow-Wilson feared would lead to universal socialism - and increasingly technologically based forms of communication, like the wireless, telephone and television (and, we may add today, the computer), have had major implications for criminal law and the penal system. These forms of technology are, in an important sense, indifferent to traditional social relationships, particularly to values associated with individualism, such as, for example, the private ownership of property. These new forms of technology push property and also communication away from the individual into the abstraction of mass society. It is not meant by this that individuals do not "own" cars, wirelasses or computers, but that this relationship now takes place in a distinctly and qualitatively different public sphere. (In the case of cars this is further complicated by the need for a third party risk insurance.) Ownership of a car or a telephone is not an end in itself, but rather a means to wider, more general ends in which actors have a relatively "low" emotional (or in Weber's terms, substantive) commitment. This contrasts with the core or

standard type of relationship envisaged by modern criminal law in which a harm against private property or against the individual's body is seen as one committed against the whole person and therefore as warranting serious moral evaluation and condemnation.

It is in this context that we can better understand the functional-type argument sometimes advanced, that to fully criminalise the common means of transport or communication would be an over-extension of the law and result in an "overloading" of the criminal justice system. It is not simply for "practical reasons", such as the use of law inhibiting the free flow of traffic or of communication, that the criminal justice system classes statutory offences as less serious. Rather, these practical reasons tie in with, and overlay, the important conceptual changes outlined above.

So the relationship between Class VII offences and the fine is a complex one which cannot be understood only in terms of the growth of statutory legislation. The other factors briefly discussed enter in the picture and must be given full explanatory weight. Also, it is important to keep in mind the long term nature of the process. The statistics presented in Table 2 allow us to view the process only from 1897 onwards, when, as the table makes clear, the fine is already the most regularly used of sanctions. This is further support for the argument advanced; statutory offences, and the growth in them during this century, are not the "cause" of the growth in the popularity of the fine, rather they have altered the nature of the offences most regularly dealt with by this sanction in Class VII.

There is also a broader issue not yet broached to which these considerations naturally gives rise. Why is it that the fine is seen

as the appropriate sanction to use for offences or harms considered to be less serious? Why not some other sanction? Why not imprisonment? We leave consideration of this to the final sections of this chapter. At this stage of the argument, however, it should be clear that, far from being a backwater of little interest - as the lack of attention paid to summary offences by the literature may lead one to believe - these offences in fact stimulate questions of great sociological import. And, in particular, they return us to one of the central themes of this study, the social basis of the evaluation of harm as it is expressed in the criminal law and in punishment.

We turn, from consideration of Class VII, to an overall view of the use of the fine by comparing its "take up" in the classes selected for study. Table 3 below compares volume changes in the number of cases in which a charge has been proved to volume changes in the use of the fine over the period.

Table 3

Volume changes in number against
whom charge proved compared to volume

Changes in use of fines

Class	% change in volume of cases proved	% change in volume of fines
I	-36.6	-49.7
II	+965.0	+15323.0
III	+159.8	+692.8
VII	+82.4	+105.0
All crimes and offences	+87.3	+118.9

As can be seen, there are considerable differences between the classes, but one clear trend is discernable. The use of the fine has expanded most rapidly in the two classes dealing with property crime - Classes II and III. In both, the take up of the fine clearly outstrips the rate of change in volume increase; in Class III the proportional comparison is 1:4, while in Class II it is 1:16 (approximately). The magnitude of these rates of change does suggest major alterations either in the type of crime which composes this class, or in sentencing practice, or a combination of these. As a provisional and cautious conclusion, we may say it is improbable that major changes of the type we have observed will be explicable in technical terms - that is only by reference to changes in classificatory practice. Such alterations can have immediate and sometimes dramatic effects on the statistics, but this can be counterbalanced by time. What we see in the case of Classes II and III are long term developments, and this suggests we must seek for their explanation by other broader criteria as well.

While these internal developments in Classes II and III are of interest and importance, it would be wrong to exaggerate their significance for the criminal justice system as a whole. In comparison to Class VII, the total numbers involved in Classes II and III are small. As we saw from Table 1, Class VII accounts for 84% of all the cases proved, while together Classes II and III account for only 15.4% (1978). Although this is a notable increase over 1897 (8.78%), it is not a basis from which to try and explain trends in the larger criminal justice system. As was pointed out earlier in the case of Class II, the nature of the dramatic changes must be offset

against the very small number of fines (30) given in 1897. With this as the baseline more or less any developmental increase will appear extraordinary.

The one class which differs in many ways from the others is Class I. As can be seen from all three tables presented, this is the only one in which there has been a decrease in overall business and in the use of all sanctions except probation. If we return to Table 1, then it can be seen that there has been a decline in the total number of all other disposals compared to an increase in the total use of probation orders (an increase of 451.4 in volume usage). Although the number given in 1978 is still small in absolute terms (193 as compared to 35 in 1897), probation is the only penal measure in which there has been an increase at all. If, however, we convert these figures into a measure of proportional usage, it will be seen that admonitions were used relatively more frequently in 1978 than they were in 1897, even though there has been a decrease in the absolute number given.

The general pattern of development in Class I thus is of a decline in usage of the two main disposals - detention and fines - but an increase either in absolute or relative terms of admonitions and probation orders. A significant factor accounting for this decline in business and for the use of the fine especially at the beginning of the period, is the removal of petty assaults from Class I to Class VII, where they become included under breach of the peace. Although this was later reversed in 1951, when a substantial number were reclassified as criminal assaults, it is still nevertheless relevant. Similarly, husband and wife assaults, the most common crime against the person at the beginning of the period, have been continually

"downgraded" and are now mostly (except for serious assault) recorded as breach of the peace.

To summarise:

- (a) with the exception of Class I, there has been a significant and important increase in the use of the fine over this century.
- (b) the increase in the use of the fine in Classes II, III and VII, and in all crimes and offences together, is greater than the increase in business in each class.
- (c) the most dramatic increase in fining is in the two classes recording crimes against property.
- (d) the significance of Class VII must not be under-estimated due to the total number of cases that fall within it. However, there appears not to have been a change in sentencing practice following the growth of statutory legislation such as that related to cars and moving traffic offences. Rather, this has changed the nature of the offences fined within the class, rather than expanded the significance of the class to the rest of the criminal justice system.

So far we have discussed changes in the use of sanctions by a broad comparison of absolute figures over the period, and have reached provisional conclusions. While this does enable a very general picture to be drawn, it does not take us very far in understanding

either how, why or when the observed changes took place. From the discussion of developments in the use of the fine in Class II, for example, we can glean that changes have occurred but not why or when. For instance, is the growth in the use of the fine in this class a recent phenomenon confined to the period after the second world war, or is it the result of longer term changes?

To answer this sort of question we need to present the statistics in a different way. The graphs presented in the following argument are designed to show, first, the relative use of the different sanctions in the selected classes, and second, how the use of these sanctions has changed and varied over time. We present the figures expressed as proportions, as we have yet to establish in any detail or with precision, the proportionate use of the main disposals available to the court. Also, as was said earlier, the use of relative or proportionate figures allows one to identify and describe more clearly general trends in the use of sanctions. To put this a little differently, proportionate figures enable one to see how the increase (and decrease) in business, outlined earlier, has been distributed among the main sanctions available. The result is a more complete and rounded account of the pattern of sentencing in the Scottish criminal justice system.

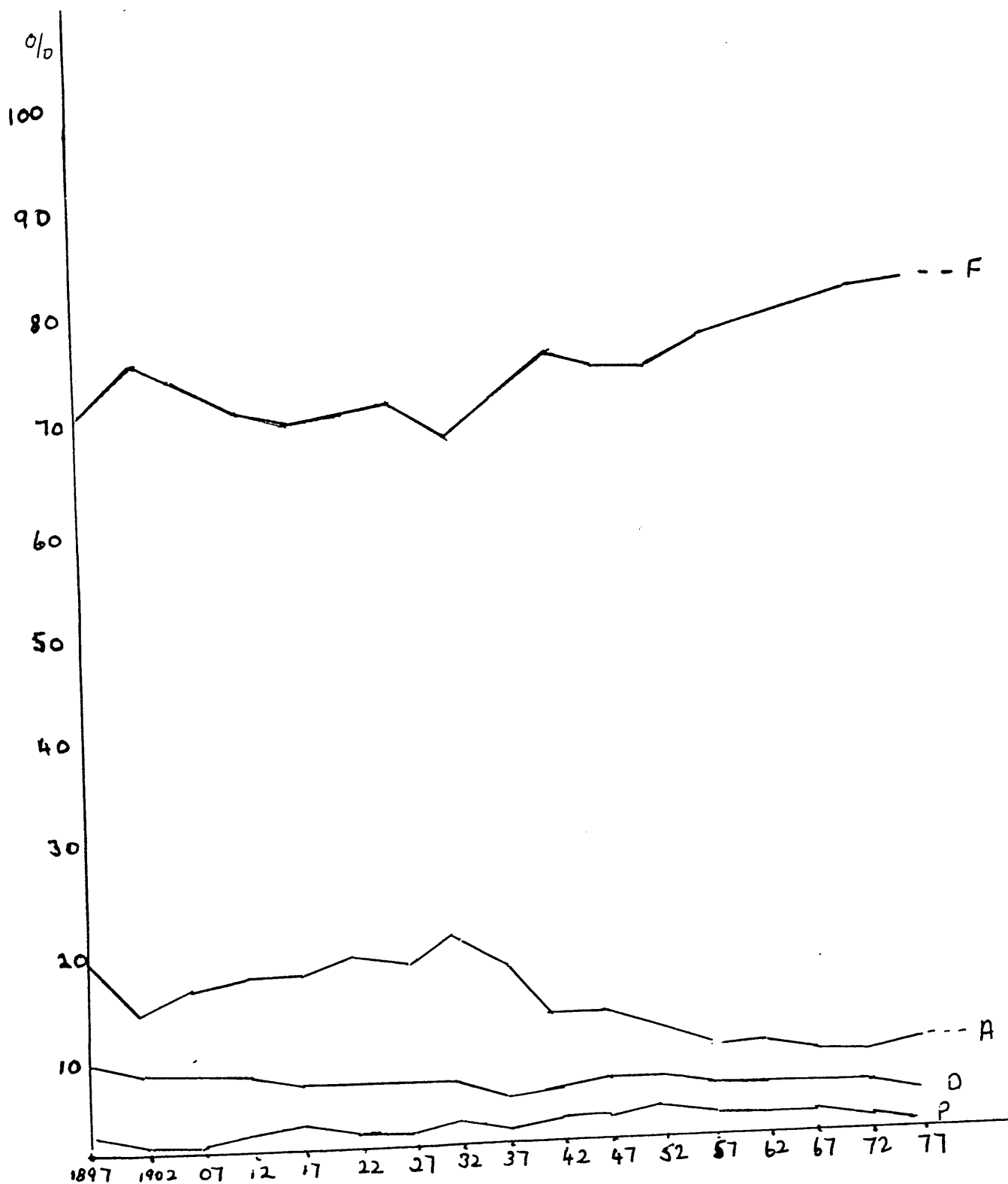
It is necessary to introduce two further qualifications before proceeding to the substance of analysis. First, the objective is not to explain every detailed fluctuation in the use of sanctions; rather, it is to identify and account, where possible, for the broad direction of change. Second, it is important to realise the effect of the two world wars on the figures. As Shields and Duncan (1964) and the

preface to the relevant volume of the statistics make clear, these can dramatically change the nature of the business dealt with by the courts. For example, the commentator in the prefaces to both the 1914 and 1919 volumes of statistics point out that the drop in certain crimes - drunkenness and husband and wife assaults - was caused by men going to war, and the consequent rise in the same offences by their return. Indeed, Shields and Duncan (1964) argue that war "upsets" the statistics for a period of ten years or so. This suggests, first, no special significance is to be attached to the war years in terms of the overall pattern of development, and, second, to gain a general picture, we must look carefully at the years immediately before the warS and compare them to the period several years on from the end of the wars. We introduce these qualifications not to deny the importance of wars as sociological phenomena, but rather to indicate caution in the interpretation of the statistics.

The proportional use of sanctions for all crimes and offences and for the selected classes

The following graphs describe the proportionate use of sanctions for all crimes and offences and for each of the selected classes separately. Also, the graphs epitomise the use of the main sanctions individually for all classes of crime and offence.

The graphs reinforce the main conclusions of the previous section. The most dramatic increase in the use of the fine takes place in the two property crime classes (see Graphs 3 and 4); in Class VII there appears to be some increase in the use of the fine but this is neither as dramatic nor as proportionally significant for the class



GRAPH ONE: DISPOSALS AS % OF TOTAL

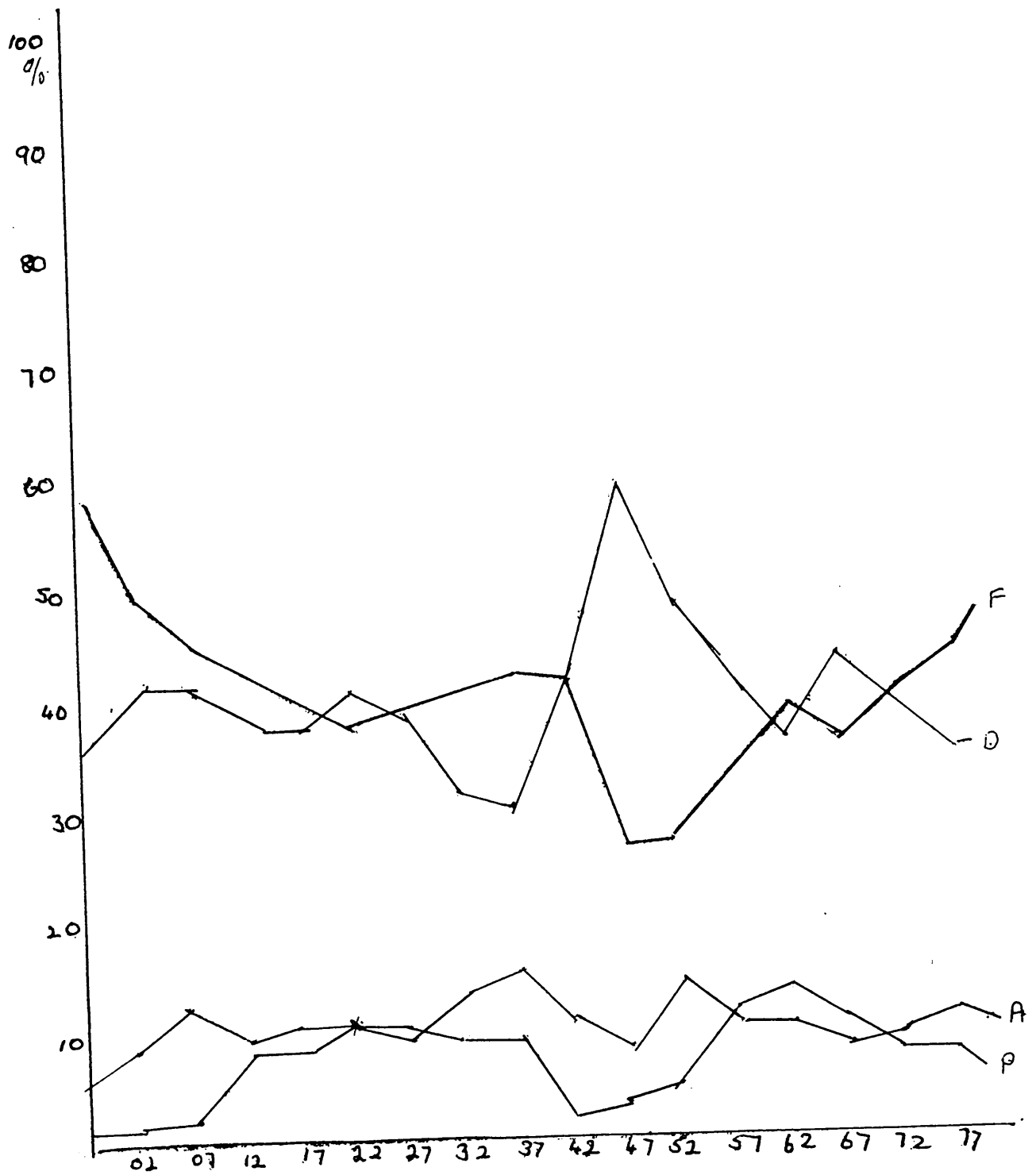
LEGEND

F = FINES

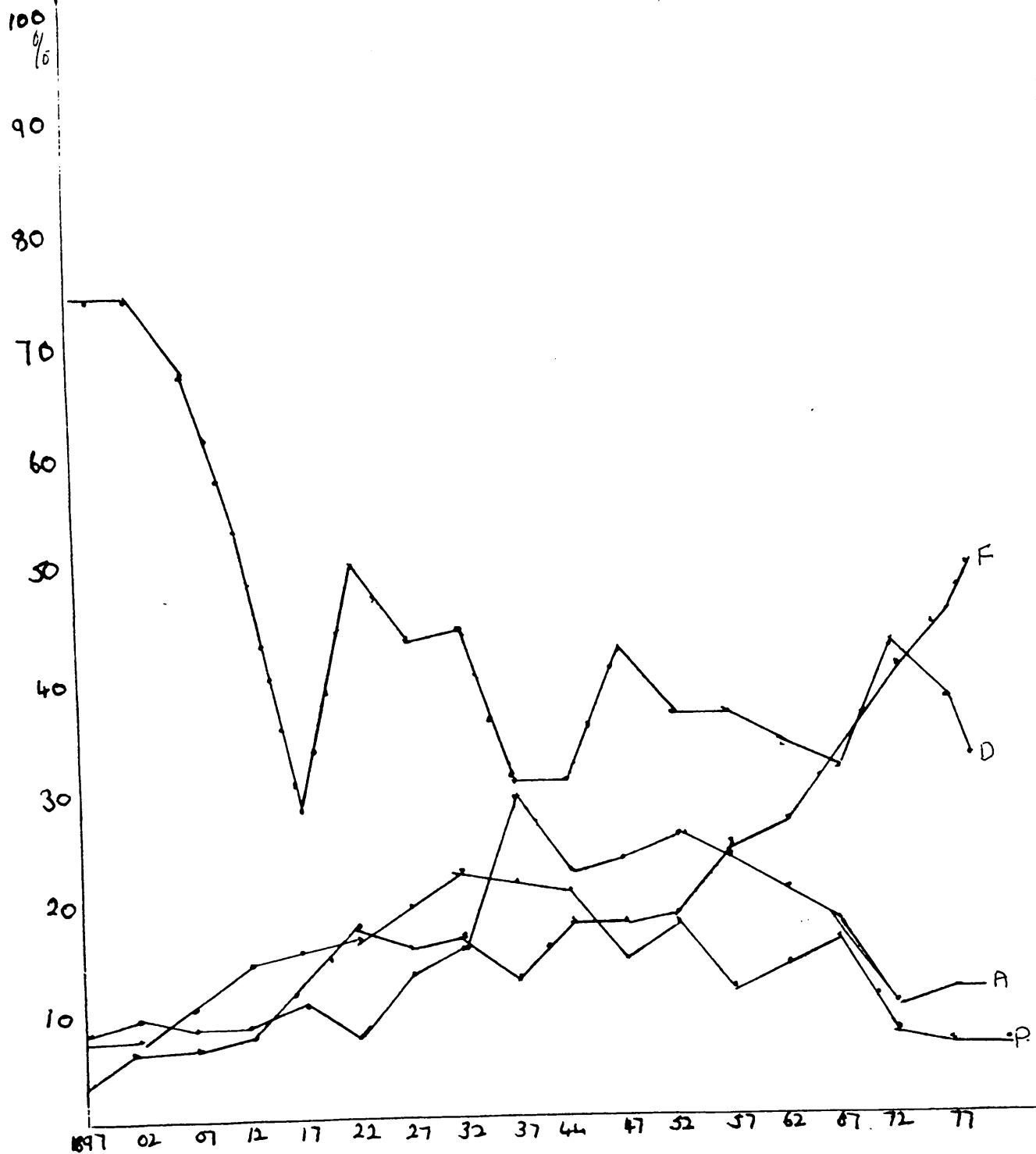
A = ADMONITION

D = ALL FORMS OF DETENTION

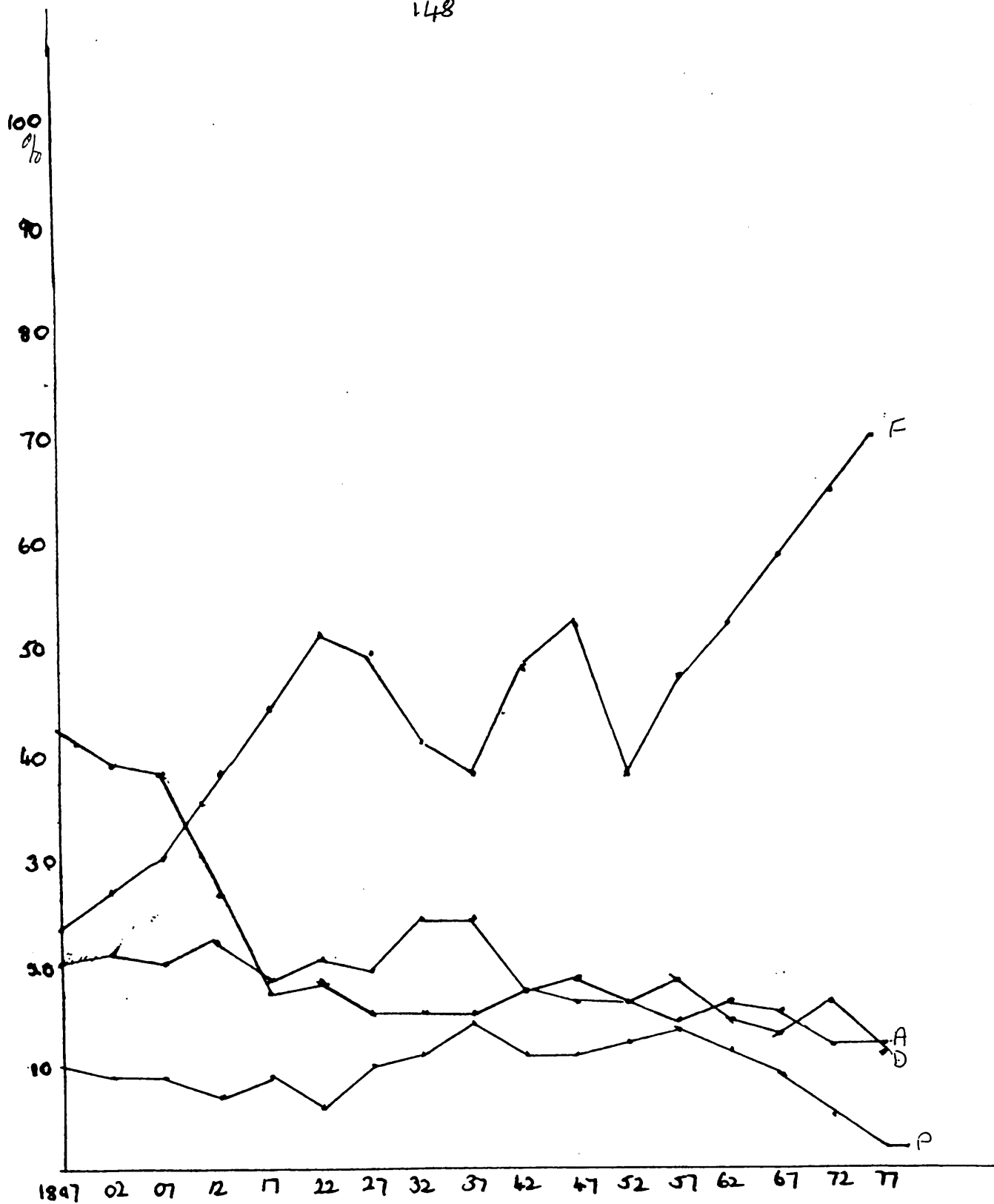
P = PROBATION



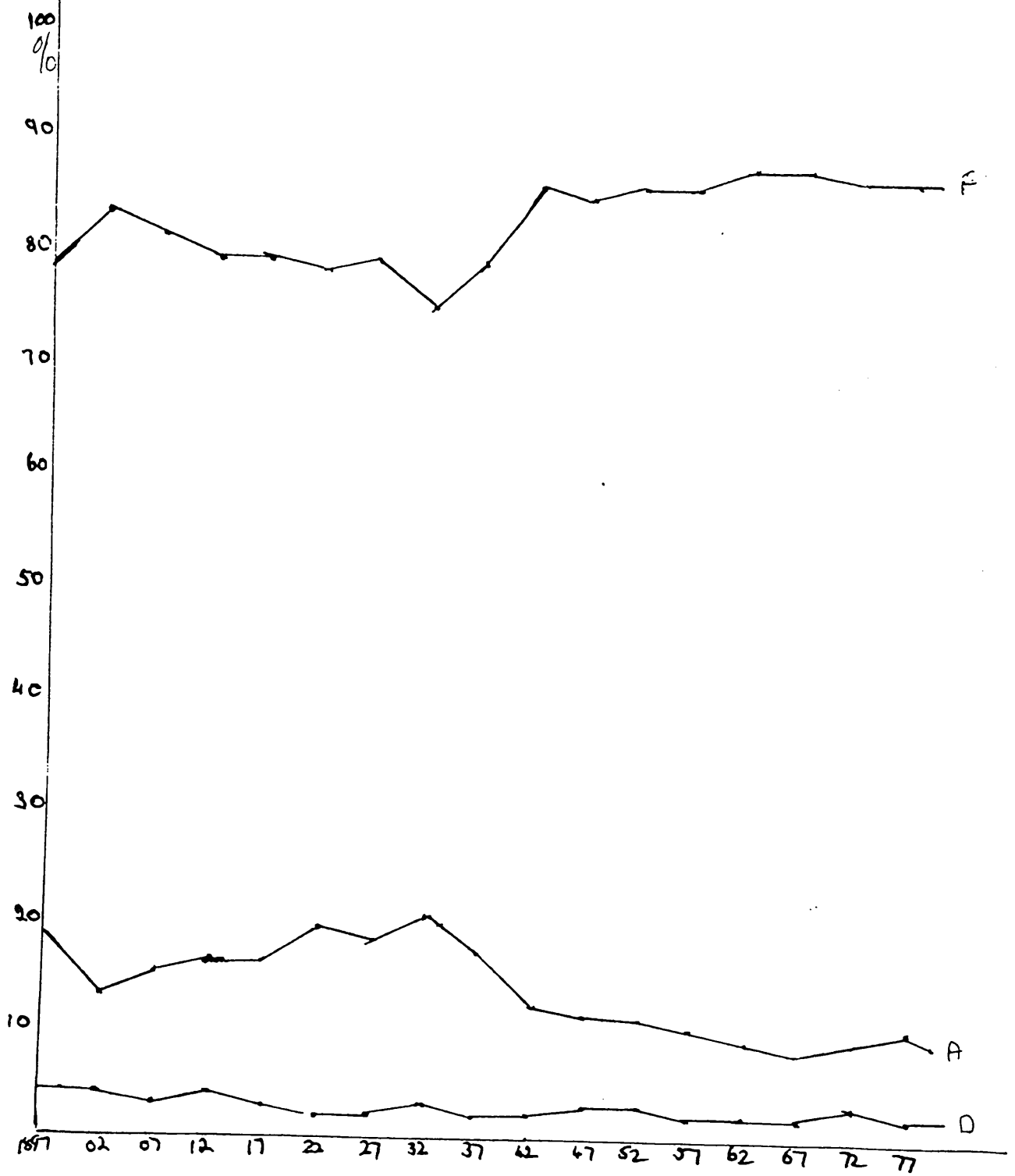
GRAPH TWO - CLASS I CRIMES: DISPOSALS AS % OF TOTAL



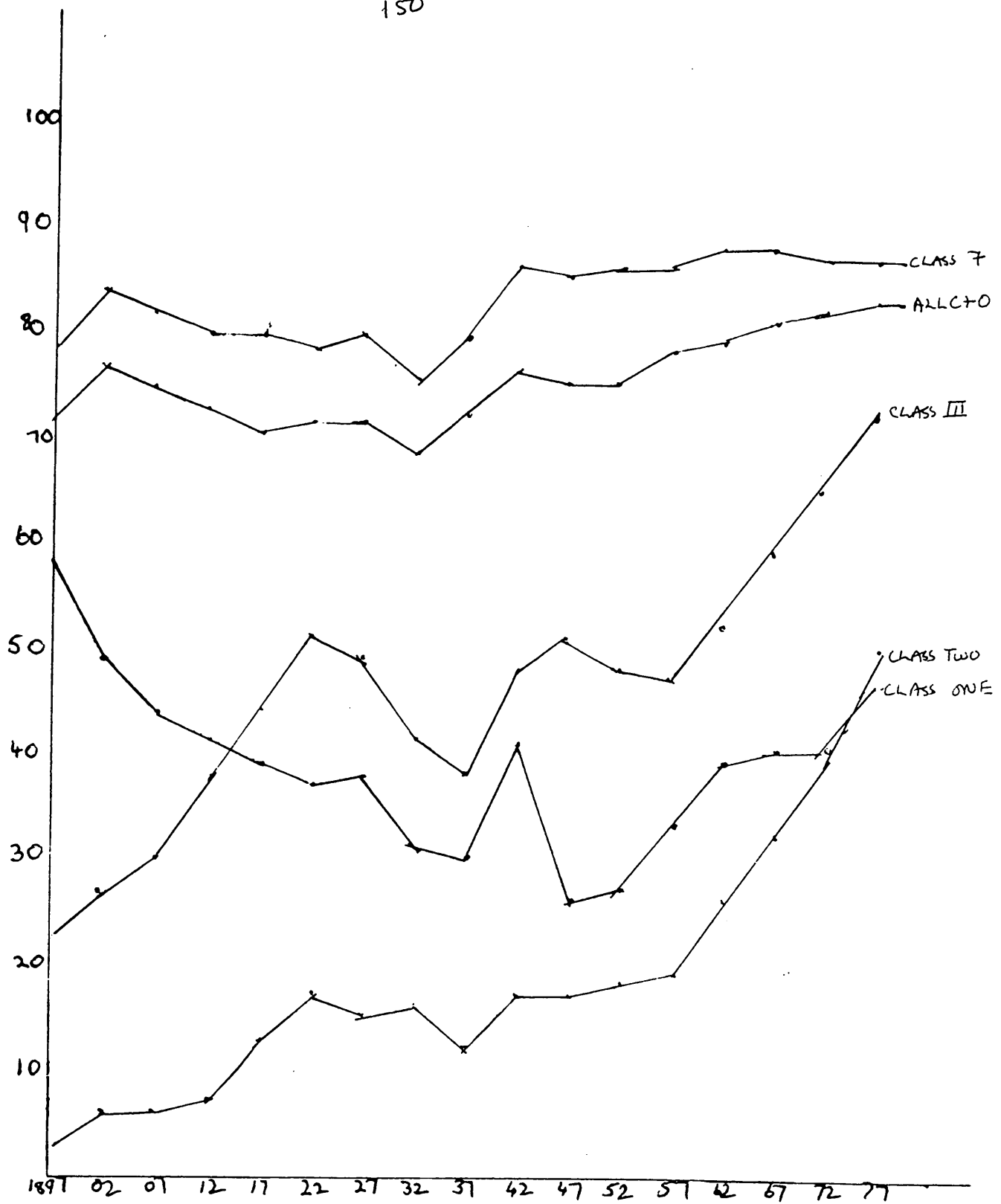
GRAPH THREE: CLASS TWO CRIMES DISPOSALS AS % OF TOTAL



GRAPH FOUR. CLASS THREE CRIMES DISBURSALS AS %

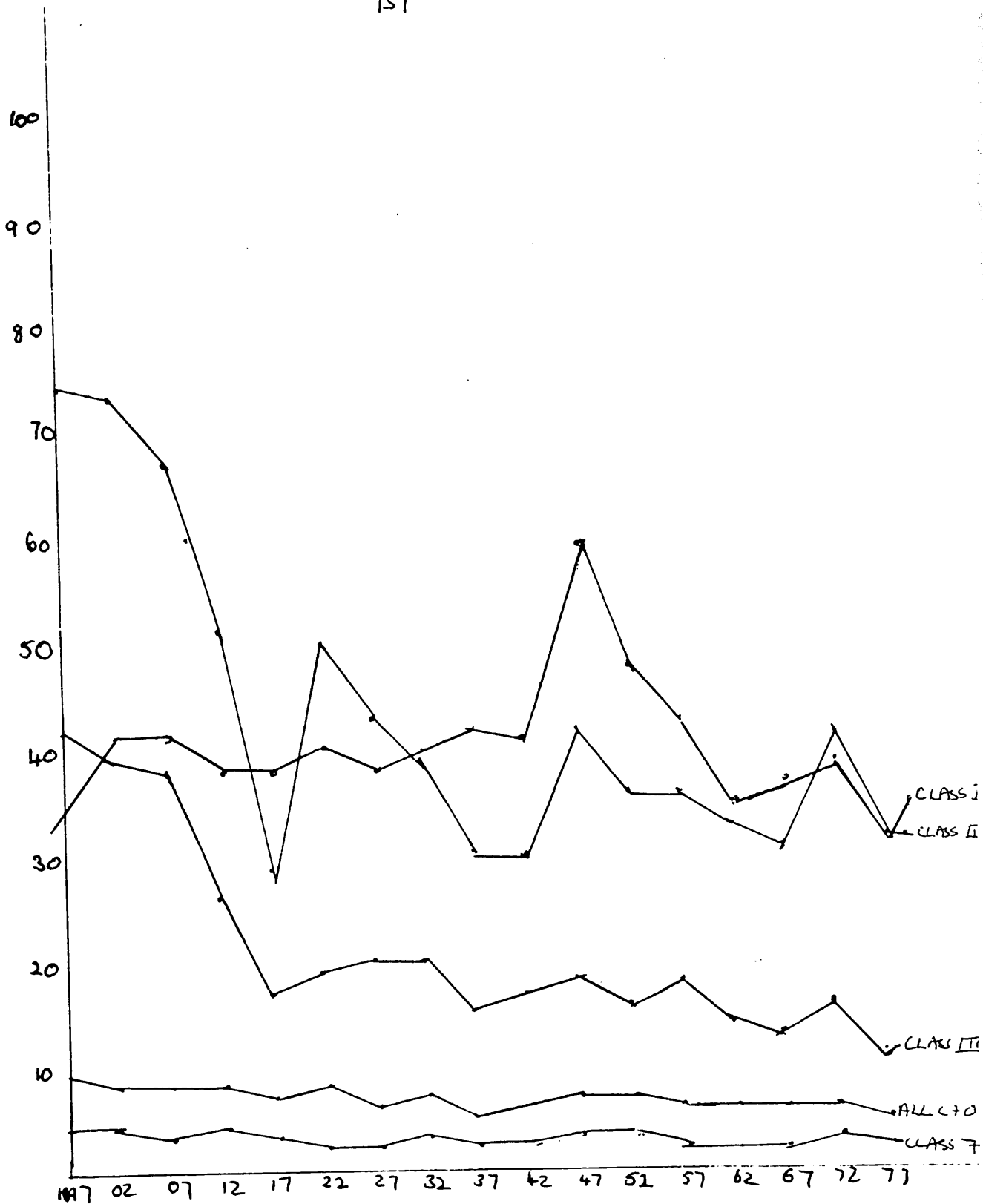


GRAPH FIVE : CLASS SEVEN DISPOSAL AS %



GRAPH SIX. FINES AS % FOR ALL CLASSES COMPARED AND ALL CRIMES AND OFFENCES

ALL C+O = ALL CRIMES AND OFFENCES



GRAPH SEVEN: USE OF DETENTION IN CLASSES OF CRIMES COMPARED.

as is the change in the use of the fine in Classes II and III (see Graph 5). Further, from Graph 2, which describes developments in Class I, it is clear that there is no consistent pattern of change in the use of all the four main sanctions within this class. Rather, the use of each fluctuates significantly over time. There appears to be "trade offs" between, on the one hand, uses of detention and the fine, and, on the other hand, uses of probation and admonitions.

These graphs considerably expand the broad picture previously painted. In particular, they illustrate the rate of change and direction of change over time. From them we are better able to see the date from which a change in use takes place. For example, if we examine Graphs 3 and 4, it can be seen that the expansion in the use of the fine in Classes II and III is a long-term process, beginning at least from the 1890s and, save for the 1930s, continuing uninterrupted to the present day. This is an important observation, not least because it suggests that there may well be differences in development between Scotland and England and Wales. For example, Bottoms (1983) has suggested that the expansion in the use of the fine in England and Wales took place first at the end of the nineteenth century (presumably as part of the general European policy of substituting the fine for short periods of imprisonment (see Gerbling (1981)) and remained fairly static until the second world war, and since has rapidly expanded, particularly in the indictable crimes. While the picture described by Graphs 1, 3 and 4 is not entirely different, it does appear to be the case that in Scotland the process has been more gradual and consistently expansionist throughout the period. Moreover, with regard to Class I crimes in Scotland (see Graph 2), it

appears in many ways to be very different indeed. For example, as can be seen from the graph, fines were used more at the beginning of this century than they are today. While this may be due to "technical reclassification" (first petty assaults, then husband and wife assaults - most of which were fined - were removed to breach of the peace in Class VII), this simply raises the wider issue of why these "crimes" were downgraded to "offences". Why these changes in evaluation?

For the moment, we leave these wider issues and proceed to describe more fully the changes described by the graphs. From Graph 1 we can observe the broad lines of development in the use of the four main sanctions for all crimes and offences. Three principal features are immediately apparent.

First, the graph clearly illustrates the predominance of the fine over all the other sanctions. This is perhaps the most important observation. While, proportionately, the use of the fine falls only once, in the early 1930s, below 70%, the use of the other sanctions never rises (except again for a few years in the 1930s) above 20%. The simple explanation for this, as was said before, is the size of Class VII. Since during the period this group constituted over 80% of all the business with which the criminal courts dealt; it follows that the overall pattern of sentencing must be significantly influenced by movements within it.

Secondly, from Graph 1, we can see that the fine has gained in frequency of use compared to all other sanctions. Whereas, the general direction of development in the case of admonitions, detention and probation is downward, there is a general rise in the use of the

fine over the period. To be more precise, the general patterns of development can be split into two periods, 1897 to 1932, and 1932 to 1978. During the first, the pattern in the use of the fine is somewhat irregular. In the early years of the century its use rapidly increases but then tails off, save for a slight rise throughout the 1920s, until 1932. From then on it increases quite steadily except for the plateau of the war years. Certainly from 1952 its use increases without interruption. It should be noted also that the decrease in the use of the fine between 1897 and 1932 appears to be accounted for by a rise in admonitions and not by an increase in the use of detention. Indeed, the same broad pattern, but in reverse, appears to occur from 1932 onwards. As the use of admonitions falls off, the use of the fine increases. Thus, we may conclude that the main line of development over time can be accounted for by "trade-offs" in the use of what are generally seen as the less punitive sanctions.

With regard to the use of detention, it can be seen that there is a fall in its use of about 50% over the period (from just below 10% to approximately 5%). This is a notable development but, generally speaking, more significance ought to be attached to its relative lack of importance (as measured by use) throughout the period. As we enter the period in 1897, detention is a little used disposal and its use declines fairly consistently thereafter.

There is a third general observation to make of Graph 1. Even if we accept the changes described, these have to be put in a broader context. If we conceive Graph 1 as describing a sanctioning structure then it is clear that little has really altered during the period. By

this is meant that the features of the structure are similar at the end of the period to what they were at the beginning. From Graph 1, it is impossible to argue that there has been any "revolution" in sentencing patterns in the system as a whole. There has been a shift to using the fine more, but this is a minor change compared to the basic stability in sentencing patterns. It is manifestly the case that this stability rests upon the central position occupied by the fine.

Several implications follow from this. First, if we are to seek for the "origins" of this sanctioning structure, then we must do so prior at least to 1897. However, if we rely on the existing penological literature to guide us in our search then we would, it is contended, find it of restricted use. The overwhelming impression created by this literature - and this is a theme as clear in the traditional penological literature as it is in the more modern, radical, sociological type - is that in the nineteenth century the prison was the normal and indeed the most common punishment. Our analysis questions this. As was pointed out before, we enter the picture only in 1897 when the fine is already the most common sanction in use. Unless one believes that such patterns, like Topsy, grow up overnight, or that there exist clear radical ruptures in historical processes (and although some, for example Foucault, claim for just such a history, there is not supposed to be one at the end of the nineteenth century), then one has to explain a pattern that has been in existence for a considerable period of time.

In my view, it would be mistaken to try to resolve this issue by reducing it to one about which sanctions were used most and when.

This is an important question made considerably more complex by the way in which statistics are reported in the nineteenth century. (In Scotland there was no comprehensive reporting in the general returns of a class of offences equivalent to Class VII; rather, these are only presented for separate counties and burghs with the result that, as far as the general returns are concerned, the offences for which the fine is most likely to be used are seriously under-recorded. This changed in 1897 when the new comprehensive list of crimes and offences we use was drawn up. We have not examined the English figures in enough detail to see if the same is true there also. However, as the pre-1897 list was compiled earlier in the century (as was the 1897) to "assimilate" it to the English one, a similar story cannot be ruled out.) This line of argument is to be resisted, because underlying this empirical question is a more fundamental one about how we conceive of "punishment". The problem with most literature on the penal system is, as we noted in the first chapter, that it proceeds upon the assumption that punishment is essentially about deprivation of liberty as symbolised by the prison. As a limited account of how the major crimes were dealt with this does have some substance, although it must be pointed out that it ignores the significance of transportation and banishment. However, this account becomes problematic as it becomes overextended. The presumption is that one can understand the system as a whole from the vantage point of how crimes were dealt with; this leaves out of analysis offences and also ignores those occasions on which the fine was used for crimes anyway (for example, for 1838, of 673 offenders charged with assault, 130 (19.3%) were acquitted or discharged, 9 (1.3%) were transported, 399

(62.6%) sentenced to imprisonment, and 123 (18.83%) were fined. Thus, in terms of those convicted, the figures read - death: 1.6%, imprisonment: 73.5%, fine: 22.7%).

Another implication follows from our analysis. This concerns the explanatory weight given to Class VII offences. At the risk of prolixity, it must be reiterated, both that it appears impossible to understand the structure and pattern of sentencing as regards the whole system, unless this class is fully taken into account, and thus one must repeat warnings against ignoring it. There appears almost to be a conspiracy of silence in the literature. Sociologists and policy-makers (see, for example, Shields and Duncan (1964), and McClintock and Avison (1968)), perhaps for what are seen as good reasons, have traditionally ignored the impact of the group of harms called offences. Indeed, part of the problem with the accounts briefly alluded to above is that they do just this. To do so, however, is to necessarily limit the scope of inquiry even before investigation has begun.

The proportionate use of the fine in the selected classes of crime

So far we have emphasised the stability of sentencing patterns as a whole throughout the period. We turn now to a more detailed examination of the classes of crime in which there have been significant alterations and, in particular to Classes II and III, where, as it has been shown, there is a considerable increase in the use of the fine and a decrease in the use of detention. (In the course of this discussion it should be kept in mind that Classes I, II and III correspond to indictable crimes in the English context. They

constitute the most serious of crimes prosecuted in Scotland.) The increase in the use of the fine for them is thus a matter of considerable sociological and pragmatic import.

Graphs 2, 3, 6 and 7 describe these changes. As can be seen from Graphs 2, 3 and 6 there is a similarity in the shape of the curves recording the increase in the use of the fine for Classes II and III. From the beginning of the period there is a rapid increase in the use of the fine followed by a decline throughout the 1920s and 1930s, but from 1937 onwards a continuation in upward movement. There appears to be a check on this in the 1950s in Class III, but from 1957 onwards the rate of increase in both classes is rapid and consistent. It should be noted first, that in these periods of decline, the lowest point reached each time is always above that at which the previous increase began, and second, that in these periods of decline, there appears to be more movement into admonitions than into detention. This can be established by comparing Graph 6 to Graph 7 and also Graph 3 to Graph 4. At the very end of the period, from 1967 onwards, the fine significantly increases compared to the other sanctions which all tail off dramatically. In the case of probation, this is probably due to the effects of the 1968 Social Work (Scotland) Act, which established the children's hearings system, and thus removed a high offending group from the purview of the criminal court and abolished a separate probation service in Scotland. (For more details on the decline in probation see the report by N. Passas, 1985.)

The graphs thus confirm the provisional conclusions reached earlier in this chapter, i.e., there appears to be a change in sentencing practice in these two property crime classes. Broadly

speaking, the fine increases in use very significantly whereas there is a proportional decline in the use of detention, probation and admonitions.

It is, of course, one thing to describe changes in the use of a sanction for a whole class of crimes and quite another to do the same for particular crimes which fall within the class. Yet, this latter task must be undertaken as it is quite possible for the overall picture for a class to be distorted by the preponderance of one particular crime within it which is being "disproportionately" fined. In order to "test" for this, we intend to examine two crimes within Class II in more detail where the increase in the use of the fine has been greatest - robbery and housebreaking. Of these, housebreaking is, and has been, numerically the more common crime. Indeed, from 1897 onwards, the commentaries which preface the annually published statistics point out the rapid rise in its commission. For example, in the 1903 report, it is commented that cases of "housebreaking have been considerably more numerous in recent years, and, as a consequence, the balance of real criminality in comparing the statistics of 1898 and 1903 is against the year under report" (Cmnd. 2317, p.8). That this trend has continued, can be seen from comparing the following tables. Table 4 records the total number of persons convicted of crimes of housebreaking and robbery and also the use of detention and fines in randomly selected years from 1839 to 1912. Table 5 similarly shows the total number of cases in which a charge is proved and the use of detention and fines from 1965 to 1978.

160
Table 4

The use of detention and fines in housebreaking and robbery
in randomly selected years:

Source relevant volumes of judicial statistics

Year	Total Convicted		Detention		Fines	
	House- breaking	Robbery	House- breaking	Robbery	House- breaking	Robbery
1839	281	32	280	31	-	-
1849	360	51	359	51	-	-
1860	166	40	160	39	2	-
1895	235	141	218	136	9	5
1902	586	-	398	-	39	-
1907	924	-	570	-	49	-
1912	1,088	-	521	-	88	-

1) Figures for Detention include transportation and penal servitude.

Table 5

The use of Detention and fines in housebreaking and robbery 1965-1978:

Adapted from Criminal Statistics

Year	Total against whom charges proved		Detention		Fines	
	House- breaking	Robbery	House- breaking	Robbery	House- breaking	Robbery
1965	10,193	246	29.8	63.4	30.5	14.2
1966	10,832	268	31.1	65.6	31.2	14.2
1967	11,348	324	30.3	61.4	32.5	16.4
1968	10,977	404	31.4	62.7	33.7	15.8
1969	11,781	398	30.7	64.0	31.8	20.1
1970	13,140	480	30.7	60.4	32.1	19.2
1971	10,445	465	37.4	67.8	32.8	15.7
1972	7,831	370	41.1	67.0	39.8	21.6
1973	6,351	293	35.5	67.6	42.5	16.7
1974	7,019	348	34.0	60.3	45.8	22.7
1975	7,533	392	35.1	66.3	46.7	20.2
1976	7,856	475	32.9	62.3	48.1	24.2
1977	8,716	476	30.1	65.1	51.3	23.3
1978	8,856	490	31.0	58.9	50.5	28.6

These tables show that there has been a continual expansion in the number of cases of each crime the court deals with and that there has been a significant development in both of the use of the fine. Housebreaking has expanded more than robbery. If we compare the total number of cases of housebreaking in 1839 to that in 1978, there has been a 3151% increase; the figure for robbery is 1531%. Numerically, housebreaking continues to be the most common of crimes in Class II. It follows from this that the expansion in the use of the fine in Class II crimes is closely associated with its use in housebreaking.

Further evidence for this argument can be gathered if we examine the differential expansion in the use of the fine in the two crimes since 1946. In the crime of robbery, the fine was used only in 1.61% of cases in which a charge was proved as compared to 21.4% of cases in housebreaking. This pattern is discernable in the 1920s as well. Whereas, for example, the fine was used in 24% of cases of housebreaking in 1925, it was not used at all for robbery. Clearly then, the use of the fine in Class II as a whole is intimately connected with the very great expansion in housebreaking. The upward moving curve described in Graph 3 thus is to be explained by developments in housebreaking. However, since the end of the second world war, as can be seen from Table 5, the fine has increased in use in robbery also. The rate of increase in its proportionate use is 1787.5% - a very notable expansion indeed. How can these changes be explained? How can we account for the increase in the use of the fine in these two crimes? One way is to examine the very full commentaries given to the statistics at the beginning of the period to try and see what sense contemporaries made of the situation. In commenting, both

on the increase in housebreaking, and the increase in the use of "minor" punishment, the writer in 1908 said:

"The technical crime of housebreaking includes a wide variety of offences, varying from ransacking a mansion to breaking a shop window in order to steal cigarettes or a bottle of whisky. Some of the offences, owing to the youth of the offenders, may not justify prosecution."

The commentary continues:

"The relative importance of housebreaking in which the authors were convicted may be judged from some of the punishments inflicted.

102 of the culprits were whipped

75 of the culprits were fined

447 of the culprits were imprisoned for
periods of 3 months or under

255 of the culprits received longer
sentences of imprisonment

36 of the culprits were sentenced to penal
servitude.

The months of the year during which most of the apprehension for housebreaking occurred were June, July and August, when we have the longest days and also many cases of drunkenness and disorder."

(Cmnd. 4395, p.11)

And in 1905:

"The punishments inflicted on the housebreaker would lead us to believe that the magistrates and judges ... did not take a serious view of many of the crimes." (Cmnd. 3226, p.9)

The minor nature of many of the particular incidents of housebreakings, coupled with the youth of a good proportion of the offenders, thus is seen as the reason for the increase in the less punitive sanctions. This was not seen to be the only explanation, however. In 1904 the commentators in talking about penal servitude argue:

"The reduction in the number of these sentences is probably due more to a general tendency which has been operating for some years to mitigate the severity of criminal sentences, than to any reduction in the number of crimes committed."

(Cmnd. 1830, p.2)

Hence the decrease in the severity of punishments was seen to be important in its own right. But the various factors combine; changes in the nature of crime, especially an increase in the number of minor cases, together with alterations in broader views on the severity of punishment, lead to a new emergent pattern of sentencing concentrated on the minor penalties. And, as whipping - which was seen as a milder, less stigmatising punishment for young offenders than imprisonment - falls from favour, there is a shift into fining.

It is within this context that we can explain the increase in the use of fines in robbery as well as housebreaking. As the crime grows

in size, there appear more minor incidents of it, and this, in conjunction with already existing "more lenient" attitudes towards punishment, facilitates the growth in the use of the fine. Moreover, as a general background to this, legislation was passed in the 1881 Summary Procedure (Scotland) Act and the 1908 Summary Jurisdiction (Scotland) Act which enabled a fine, not exceeding £25, to be substituted for crimes for which certain specified periods of imprisonment could be given. The 1908 Act extended this power for crimes taken on indictment and this power was further consolidated by the 1954 and 1963 Criminal Justice Acts.

The rise of the fine in Class II crimes thus can be seen to be the result of a complex series of changes. While its increased use was due to the rapid expansion of one particular crime, housebreaking, our analysis does suggest the processes that underpin it have become generalised and applicable to the other main crime in the class, robbery. An interesting pattern of development thus is suggested: fines are used first against property crimes only and then for crimes which involve an element of violence directed against the person. (The greater usage of fines in Class III crimes at an earlier date than in Class II, confirms this. As can be seen from Graph 4, the fine was used more in Class III where the predominant crime was theft (followed by reset) in 1897.)

The use of the fine in Class I crimes - those against the person - remains to be explained. As we established earlier, the pattern of sentencing in this class is more irregular than in the other classes of crime. Graph 2 demonstrates this irregularity, which is especially pronounced with regard to the fine. Indeed, this is the only class of

crime which, in terms of its size and in terms of the use of the fine, is smaller at the end of the period than at the beginning.

The irregularity in the use of the fine can be related to a continual process of redefinition of the crime which predominates - assault. At the beginning of the period the most common type of assault prosecuted was husband and wife assault. Indeed, so common was this crime that it was given a separate status as a crime in its own right. Examination of the statistics shows that the majority of husband and wife assaults were taken on summary procedure and were fined. The explanation given for this practice was the perceived connection of the crime with drunkenness. The commentators to the statistics point out the numbers prosecuted for drunkenness and husband and wife assaults rise and fall in similar ways. As prosecutions for drunkenness (an offence) increase, so too do those for husband and wife assaults (a crime). The connection between these assaults and drink appears to have been seen as the reason why they were dealt with by fines. Drunkenness, it seems, was a mitigating or extenuating circumstance. This ties in with a general practice already established. Generally, the Scots judiciary seem to have tolerated violence, especially if it was connected with drink. In the early decades of the nineteenth century, for example, practically the only crime in which the fine was used at all was assault (which was seen as connected with drink).

The rapid decline in the use of the fine in Class I at the beginning of the century can be accounted for in part by the shifting of an increasing number of petty assaults to Class VII where they became included in breach of the peace. Also it can be explained by

the general fall in the amount of crime in this class. As the early volumes of the statistics make clear, the number of crimes against the person fell from the 1850s onwards until about 1913 when there was a slight upward movement, which was counteracted by the effect of the first world war. As has been pointed out, the number of husband and wife assaults and drunkenness prosecutions fell in 1914 and did not start to rise again until 1919.

The general picture that emerges therefore is that the type of crime in Class I at the time most likely to be fined (a) fluctuated and (b) was increasingly defined out of the class altogether. Another important factor was the age distribution of offenders in the various classes of crimes. This is shown in the following table.

Table 6

Convictions per 100,000 of population:
Source Judicial statistics 1898

Class of Crime	Age							
	12	12-16	16-21	21-30	30-40	40-50	50-60	60+
I	-	10	67	214	327	257	121	34
II	4	32	51	43	10	10	5	2
III	77	450	370	328	229	229	120	63

As can be seen, there are important differences in distribution of juveniles and adults between Class I and Classes II and III. In Class I, the majority are technically adults (21+) while, as in the

other classes, there are more juveniles and young offenders. The effect of this on sanctions is that the prison would be used proportionately more in Class I, than in Classes II and III.

Generally, as can be seen from Graph 2, the use of detention in Class I over the period has remained relatively constant, save for the important fluctuation immediately before and during the second world war. In this period, there was a straightforward exchange between the fine and detention which ceased more or less at the very end of the war. Thereafter, the use of the fine does fluctuate, but steadily rises. For example, in cases of sexual assault (rape, assault with intent to ravish and indecent assault), the figures for the fine in 1946 and in 1978 are 26.4% and 33.3% respectively; for assault are 33% and 29.5% respectively; and for cruel and unusual treatment of children are 22.8% and 32.4% respectively.

Summary

We are now in a position to summarise the mean findings of this empirical survey.

- (1) There appears to have been a significant increase in the amount of registered crime and offences with which the criminal courts deal, but
- (2) this does not seem to have caused far reaching or fundamental changes in the pattern of sanctioning as measured by their proportionate use;
- (3) this can be explained by the importance of Class VII

offences in the overall distribution;

- (4) however, there have been significant changes in sentencing practice in Classes II and III - the property crime classes.
- (5) These can be accounted for in terms of change in (a) the nature of the types of crime, (b) the age structure of the criminal population, and (c) the emergence of what was described as a less severe attitude as regards punishment.

There are a number of broader conclusions that can also be made. First, it appears that there is no mechanical relationship to be found between volume increases in crimes and the pattern of developments in the use of sanctions. Rather, and this may seem a rather obvious but nonetheless important conclusion, there always exists an intervening stage composed of the evaluations sentencers make; the actual distribution of sanction rests upon assessments made by the judiciary. Both the regularities and changes we have been able to demonstrate are to be accounted for by judicial reassessments of the nature of the harm involved. In a way it thus makes sense to interpret the general trends, say in Classes II and III, as indicating changed perceptions of the nature and significance of harms done to property with and without violence. The judiciary appear to assess these less severely at the end of the period of study than they did at the beginning. Why these changes have taken place, even given our summary conclusions above, remains in part a matter of conjecture. More importantly, what we have not shown, and could not demonstrate on the basis of the

evidence before us, is why these changes point in the direction of the fine. Why, for example, should the development of a more "lenient" attitude result in an increased use of fines rather than the other "minor" sanctions available to the court?

These changes in the use of sanctions must be placed in the context of the broader societal developments discussed in the first part of our inquiry. As we argued in the last chapter, the Scottish criminal justice and penal system has been subject to a process of rationalisation since at least the abolition of the heritable jurisdictions in 1747. By this is meant it has become increasingly bureaucratic and centralised. As Weber argues, rationalised systems develop a particular type of rationality, the formal legal, characterised by adherence to means ends related rules - in general, they develop an administrative type. Decision-making becomes governed by rules which limit discretion in the name of calculability and routine. These changes, we suggest, have made the system increasingly receptive to fines. As Weber pointed out in his wider discussion of rationalisation, there exists a close, three-fold relationship between it as a general social process, money and bureaucracy. He saw money (in the form of taxation) as both a precondition for bureaucratic growth and its abstract form as meshing with the formal, rule-governed nature of the bureaucratic decision-making process. For Weber (and Simmel), bureaucracy and money epitomise modern society; they are the "universal" context for contemporary social relationships. However, there are limits and qualifications to this process of rationalisation. These arise from the necessarily wider functions that law, crime and punishment serve. As Durkheim argued, one of the

functions of punishment is to reinforce the collective consciousness, the morals and norms of society. As a result, punishment, and more generally law, conceived sociologically are represented as sacred symbols rather than as being profane. In Fuller's terms (1969), law and punishment possess an "inner morality" which must be socially recognised if they are to be seen as legitimate. The content of this "inner morality" is expressed in the other emergent characteristic of modern western society, liberalism, or more precisely, as it has come to be understood, the idea of negative liberty (freedom defined in terms of lack of intervention by the state; the law setting the limits to intervention). These liberal principles have set the limits within which the process of rationalisation has taken place. Consequently, the modern, rationalised criminal justice system is composed of - to return to Weberian language - substantive and formal rationalities which exist in tension one with the other. The fine can appeal to both; it can be seen as consistent with modern "classical" ideas of punishment, such as retribution, and also as being consistent with the administrative logic of the bureaucracy. In the Chapters which follow, we intend to explore these themes by examining how sheriffs use the fine, how the broader social forces referred to bear upon the decision-making of sheriffs, and in doing this we will be able to understand more fully the place of the fine in the Scottish criminal justice system.

The matter cannot, however, be left here. As well as this convergence between forms of rationality, the inner morality of law punishment and bureaucracy, the penal system has been influenced by other social forces. In particular, there have been general

developments in penal policy that are important to note. As Garland (1985) and others have demonstrated in some detail, since the turn of this century and possibly before, penal policy has been shaped by the growth of rehabilitation. While it remains a matter of controversy as to the precise effect of this ideology on actual penal practice, what is certain is that rehabilitation has formed one of the aims that sentencers must consider even if it is only to reject it. There is a tension between the liberal notion of legality, the morality consistent with it and the "science" of rehabilitation. Commentators as distinct as Francis Allen (1941) and Pashukanis (1978) have explored this tension. Rehabilitation is seen as illiberal in both the sense that it challenges the liberal concept of the actor as rational and also in that it can lead to administrative excess. The important point in this context, is the substitution of determinism for the idea of rationality. Although rehabilitation has never been the main or sole aim of penal policy - indeed it has always had to work in Great Britain within a larger context set by liberal notions of legality and we are now said to be in a post-rehabilitative era - its influence remains. Perhaps most importantly, it has compromised and qualified the use of imprisonment. It is difficult for sentencers to use the prison and justify it in a purely punitive fashion, except in the most serious of circumstances. The effect of this has been to leave the fine as the only "punishment" sheriffs feel they have left. As we show in chapter 6, this is a complex process and depends on the circumstance of the particular case, but, this represents a general trend. Hence for reasons other than just the convergence noted above, the fine has emerged as a key sanction able to fulfil a multiplicity

of purposes.

To this must be added the general move away from the use of imprisonment as the primary, first option sentencers use. We have noted this above. The growth of a more "lenient" attitude toward punishment has worked against the prison. For example, in the commentary to the 1925 volume of criminal statistics, it is said,

"The present day tendency to avoid committing offenders to prison whenever possible is strikingly exemplified by the figures in respect of fines."

or, in 1936,

"This is very satisfactory if only because it shows that imprisonment is being resorted to less and less as a first punishment."

All this suggests that the "rise of the fine" is due to the coming together of general, broad historical trends and more specific policy developments. However, what remains true is that those trends require sentencers to make sentencing decisions in favour of the fine. Hence we must now turn to the analysis of these decisions before we can fully understand the place of the fine in the modern, criminal justice system in Scotland.

Legal Rules, Rationality and the NormativePractice of Sentencing

I have two objectives in the next two chapters. The primary one is to report on a series of interviews with sheriffs on the reasons they give for how and why they use the fine. These interviews were of a semi-structured but informal kind and were normally tape-recorded. We interviewed sheriffs in three cities - Glasgow, Edinburgh and Dundee. The questions asked were aimed at ascertaining views on a broad range of issues from their general perceptions of the fine as a punishment to more detailed matters, for example, default procedure. By casting our net thus widely we sought to gain knowledge of how sheriffs view the fining process as a whole.

My second objective - which will be the main topic of this chapter - is more general; we offer this analysis as a contribution to the growing, but still relatively underdeveloped, literature on the sentencing process; we will argue that sentencing, as a variety of legal decision-making, is to be understood and explained as a rational, rule governed activity. Although this is far from being an original thesis about legal decision-making in the context of litigation or adjudication, it is not a case that is elaborated in the literature on sentencing. We develop our argument by considering two 'themes'. First, we examine the methods that have been used to analyse legal decision-making and we propose what we claim to be a more adequate explanatory framework; secondly, we explore different ways of describing legal rules. Finally, these themes are pulled

together in a description of what is called the "normative practice of sentencing".

We characterise a "normative practice" as a system of rules which establish offices - like that of being a judge - and govern the way in which incumbents are able to act, for example, to make decisions. We argue that two sorts of rules are used in sentencing decisions, formal legal rules and substantive ones. The first are stated rules of law enshrined in statute, in common law practice or precedent; substantive rules express desired policy aims and objectives. In comparison to formal rules they are more diffuse, open textured and are grounded in general legal culture. As we show, particular sentences are constructed out of the relationship between these two sorts of rules established by sentencers in the court. We portray the relationship as dynamic, fluid and contingent.

A Methodological Excursus

Before proceeding to the description and analysis of the interview material, it is both worthwhile and necessary to say more about the structure of this and the next Chapter and to outline their contribution to our general argument.

As has been stated, the "test" of the broader, more general themes developed earlier is whether it is possible to discern evidence of them in the day to day practices of those who "run" the criminal justice system. Description at this level is the "hard-end" of the thesis. While sentencers are not the only ones charged with running the system they do occupy a pivotal position. They are, for example, "gate keepers"; decisions they make determine what happens to

offenders and these decisions, in combination, constitute one of the profiles of the system. Hence, it is reasonable to suppose that analysis of sentencing decisions and of the basis upon which they are made can tell us a lot about the system in general.

Posing matters in this way immediately gives rise to a number of theoretical, methodological and empirical problems. Research into decision-making generally and into legal decisions in particular is notoriously difficult (see Paterson, 1982). Not only are there practical problems of gaining entry into an elite group - like Scots sheriffs - but there is the more important issue of how to make sense of the data once it is collected. The latter issue, of course, is common to studies, but is heightened in this area as the subjects of the research themselves hold already established views and theories as to the nature of their enterprise. Legal decisions are "second order" constructs, in the sense that the actors involved work within an already theorised set of relationships and contexts, parts of which are elaborate views as to the nature of legal knowledge itself (Simmonds, 1984; MacCormick, 1978).

The empirical researcher thus enters into a complex field of inquiry. The researcher has to come to terms with both the significance of the already theorised knowledge of the legal actor and with how this is applied to the particular case or cases, hypothetical or real, the actor is asked to comment on or is dealing with as a matter of immediate reality. There is a complex interplay between knowledge held and decisions taken. The researcher must untangle this relationship as well as being aware, phenomenologically, that the process of inquiry itself can transmute that which is being studied.

The "double hermeneutic" is quadrupled in this area (see Giddens, 1979).

One common way of dealing with this complexity is for the researcher to place more than ordinary reliance on existing accounts and explanations.¹ This simplifies the task, as the existing literature can be taken to represent a view of the established, abstract knowledge the legal actor possesses. In the area of civil law a particularly useful source of knowledge that can be used to this end is the published decisions of the court. These decisions often contain detailed and well worked out commentaries by judges on the nature of legal knowledge and legal reasoning. These decisions thus constitute a source of evidence and a valuable commentary at the same time. In the area of criminal law the position is significantly different for two reasons. First, there are nowhere near as many published decisions on issues of sentencing. Appeal case decisions may be published but their content is unlikely to contain the elaborate views of a general sort that published decisions in civil cases do. In particular, the content of an appeal case in criminal law is more likely to be made up of a discussion of a particular set of factual questions concerning the various grounds of the appeal than of a commentary on the nature of the legal reasoning process. Also, precedent does not bind in criminal law with the force it does in civil law. Sentencing decisions, it is said, are made case-by-case because sentencers have always to deal with the particulars of the circumstance before them (Finnis, 1972; Ashworth, 1983). In studying legal reasoning at the point of sentence in criminal law the researcher thus does not have the range of evidence and the guidance

it can give that is available in civil cases. As a result, attention is thrown onto empirical methods such as the interview as this - combined with observation - becomes the most practicable way of gaining the evidence needed.

There is a second problem faced by research into criminal sentencing decisions. The secondary literature most commonly associated with the topic is couched in a conceptual vocabulary that seems at odds with that which the subjects use to describe their own actions and processes of reasoning. If we look at existing research on sentencing we find a common characteristic. It uses a variety of quantitative social science methods, conventionally associated with behaviourism, to pursue its objectives. As one of its practitioners and critics puts it, the research utilises a "black box" model of the court to study sentencing (Hogarth, 1971). The court is seen as analogous to Skinner's famous black box - an experimental device designed to control the subject's behaviour (usually a pigeon) in order to allow the researcher to isolate the stimuli that go in and to correlate them with the responses that come out (the S-R paradigm as it is known). In the context of sentencing, the decisions are the responses, and the stimuli are the various "factors" seen to impinge on the sentencer, such as offence and offender criteria, other legal factors (the law), time, place and circumstance. Although the behavioural or empirical tradition can be extremely sophisticated (see Hood, 1969 and 1972; Hood and Sparks, 1970; Green, 1961), it is this relatively simple method which lies at its base.

There are a number of well known problems with this method. For example, like other forms of multi-factorialism it is weak as a form

of explanation. It generates a good deal of information, but has severe limitations in putting this together to form a coherent picture of what it purports to explain. But its most severe limitation for our purposes is that its explanatory vocabulary seems entirely alien to the one sentencers themselves use to describe and justify their actions. Sentencers do see themselves making decisions by mechanically taking into account various factors but for them this is a rational process¹. They do not see themselves as merely reacting in a reflex, conditioned manner to a range of stimuli. They view themselves as rational actors seeking after certain valued ends - the advancement of justice and the upholding of the law by the imposition of punishments on guilty offenders. These valued ends inform their work; they are its basis and the decisions they take can be seen as the means by which they work toward them.

The language of rationality, value and meaning is not entirely absent from the empirical literature on sentencing. At one level, much of the work implicitly feeds off such a vocabulary. Many of the studies in this tradition were undertaken to account for the problem of disparity in sentencing and in as much as this assumes the ideal of formal equality, one can see the basic problem as being founded upon an assumption of rationality. Indeed, this may explain why some of these researchers explain disparity by invoking notions of irrationality (Gaudet, 1933 for example).

Also, there is a strain towards a vocabulary of rationalism in Hogarth's description of his work as "phenomenological". He claims to examine sentencing from the actors point of view in terms of their individual penal philosophies. However, it is doubtful if Hogarth

understands the meaning of the term; certainly his actual methods of inquiry - elaborate, statistical techniques - have little to do with those commonly seen as being phenomenological.

Hence the work within this empirical/behavioural tradition fails in a very important sense to convince. As Matza (1963) once pointed out, theories and explanations appeal and convince not just on the basis of their empirical range or logical coherence. Just as important is the credibility and plausibility of their exemplar - the general image of the phenomena they purport to describe and explain. To use these terms, the empirical/behaviourist tradition of sentencing studies fail to convince because its exemplar of the sentencer fails to convince. The sentencer is portrayed in an excessively passive fashion. Decisions are explained as the product of a range of material conditions all of which are external to the sentencer. In a sense, the sentencer is an instrument of forces beyond rational control.

While this is not the place to go into an extended discussion of the merits of behaviourism³ versus phenomenology, its relevance can be seen. In arguing that the conceptual vocabulary of the empirical/behavioural tradition lacks plausibility one moves forward advocating phenomenology. A phenomenological⁴ framework becomes the point of departure.

Once this shift takes place another body of literature comes into focus. This is the more jurisprudentially inclined literature known as legal reasoning. While in the empirical tradition the concept of rationality is notable more by its absence than its presence, the reverse is true with this other approach. In this analysis of legal

reasoning rationality is the keyword: the legal process, law in general, are perceived as exemplifications of the practical use of rationality in human affairs (see MacCormick, 1978 Introduction). Legal reasoning is seen as a species of "practical reason", that is rational action aimed at achieving desired ends. The Kantian overtones of this perspective are clear. As human activity is presumed to be rational and purposive, actors' intentions become crucial to the explanation of human affairs.

In modern, Anglo-American jurisprudence this Kantianism has been kept within limits, most noticeably so within legal positivism (though clearly there in continental jurisprudence, for example, Kelsen 1964). Indeed, some now argue that legal positivism is all the more limited and restricted in consequence (see Simmonds, 1984). Nevertheless, this has not meant that the explanatory need to describe action in terms of purpose and intention has disappeared. On the contrary, the very possibility of describing legal systems is seen to rest on the "internal point of view" (Hart, 1961). Ironically, the situation is thus created that, while in the social sciences in general, advocacy of a positivist method has meant the rejection of a purposive vocabulary, the opposite is true in jurisprudence. In legal positivism, phenomenology and positivist methods come together.

The stress on rationality and purpose gives legal reasoning an obvious methodological relevance to our inquiry. It has an initial plausibility because it meshes with the vocabulary sentencers use to describe their process of reasoning. It captures the rational seeking after valued ends that characterises the way in which sheriffs described their use of penal sanctions. There are, however, limits to

its plausibility. If we look more closely at the literature on legal reasoning the exemplar of the reasoning legal actor that emerges lacks credibility as a description of what goes on in a middle level, busy criminal court like the Sheriff Court. For example, we are told that the standard or core case of legal reasoning is that of pure deduction (MacCormick, 1978 Ch.2). The judge deals with cases by applying general rules to particular circumstances by a process of deduction. Or, to vary the picture slightly, the judge is seen to make decisions in circumstances where there are no clear general rules or where rules conflict, by the application of general principles, these being suggested lines of reasoning rather than precisely formulated rules (Dworkin, 1977). Even if we make some allowance for these being ideal-typical constructs, there remain doubts as to their application to the busy criminal court. It is difficult to see how the sheriff could find time to work the syllogistic exercise or, in those circumstances where no rules exist or they conflict, seek out deep principles of the sort of which Dworkin speaks. Both these positions share much in common; they portray the judge as a sort of super-rational being apparently unconfined by time, place and circumstance.

The above account does not do justice to the great subtlety of either MacCormick's or Dworkin's work, but I suspect they will be able to withstand this. My point has not been to offer the sort of account in which such justice has to be done. Rather what emerges from this commentary is that despite its methodological advantages the literature on legal reasoning is limited by its overrationalisation. There are good reasons why it does portray judges as super-rational actors. First, the examples used in the literature on which this view

of the judge is based, tend to be carefully selected to illustrate the general perspective. The careful selection of examples is a virtue but, at the risk of being judged a crude empiricist, there remain doubts as to their representativeness. Second, most (not all) of the examples used are confined to the area of civil law. As was argued earlier, there are good reasons to discriminate between the civil and criminal area in that decisions in the former do manifest a more elaborated and more generally abstract form of thinking. These points come together; a possible selectivity of evidence, and evidence of a particular sort, deliver a picture that shores up a more pervasive ideological view of law as a rational activity.

The idea that the legal reasoning literature overstresses the rational nature of law and legal reasoning has recently been supported by Professor Atiyah (1987). Although Atiyah is at pains to avoid the English tendency of characterising law as atheoretical and pragmatic, he is equally wary of what he sees as the danger of seeing it as a tight knit logical system. As he puts it in commenting on MacCormick's work, judges "apply" logic they do not "use" it; deductive argument does not lead them to a conclusion they otherwise would not have made (Atiyah, 1987 pp.14-16). Atiyah's point is not that judgements are illogical, but that it is a mistake to inflate and exaggerate the extent to which the judge is explicitly concerned with abiding by the laws of logic when reasoning.

The view of law and legal reasoning that emerges from Atiyah's account is more open-ended than the one created by, for example, MacCormick. It describes legal reasoning as being more fluid and more concerned with the substance of the issue involved. The form of the

reasoning process takes second place to the content of the judgement.

The notion of a "normative practice"⁸ outlined earlier bears strong similarities to Atiyah's view of law and legal reasoning. It was evolved, in part, as a compromise between the two perspectives or traditions reviewed. On the one hand, it is intended to capture the general methodological position implicit within the legal reasoning literature, and in particular its stress on understanding law from the "internal point of view", but, on the other hand, also to offset somewhat its view of legal reasoning and law as tightly-knit and super rational. This brings back into the picture elements of the instrumentalism that forms the core of the empirical/behavioural tradition. The view of a normative practice has affinities also with the idea of sentencing put forward by Nigel Walker; formal legal rules can be seen as equivalent to his notion of "first order" rules: and "substantive rules" to his "second order" ones (Walker, 1985 pp.18-21).

The idea of a normative practice also tries to come to terms with certain specific characteristics of Scots criminal law. With the important exception of moving traffic and wireless offences, Scots criminal law is mostly common law. This means that the potential for discretion in the use of penal measures is considerable. It would be wrong to draw too sharp a distinction between a statute based system and a common law system in this regard. With the exception of life sentences and certain mandatory disqualifications, sentences in the former are not prescribed by statute; statutes permit rather than prescribe sentences (cf. Walker, 1985 p.111). Nevertheless, in a common law system sentencers do not have the guidance provided by

statute when sentencing in common law crimes. Any regularity in sentencing must therefore be explained by reference to a shared set of norms and rules - or as we have called it a "practice". This raises the issue of how to characterise a practice and how to demonstrate the effect of it on individual sentencers.

The answer to these questions given here turn on the issue of explaining rule-governed or rule-following behaviour. Again, this is a very broad issue, a full discussion of which is beyond the scope of this inquiry. Nevertheless some answer has to be given and the one developed utilises Rawl's famous analysis of the practice conception of rules.

There are a number of other broader themes the notion of a normative practice is designed to carry further. In our discussion of estrangement in the earlier chapters, we contended that it operates most noticeably at the discursive legitimacy level of the criminal justice system. Beneath this, we argued, the system relies on the fine. This raises the issue of the relationship between these various levels or strata. How is this relationship maintained so that they do not clearly contradict one another? The answers we have developed so far refer to broad, general historical changes and processes, such as the emergence of the modern distinction between civil and criminal law, the development of strict liability, regulatory offences and changes in the notion of what constitutes serious crime. In the last chapter we showed the effects of these changes by analysing sentencing trends. We now shift the type of analysis to investigate how this potential conflict is resolved at the most concrete of levels - in the criminal court. We argue that the conflict is resolved by sentencers

perceiving the purposes of sentencing and the fine in particular as being essentially about punishment. As we show in more empirical detail in the next chapter, sheriffs perceive the purpose of the penal system to be about achieving justice through the implementation of punishment. They understand punishment in classical terms; the infliction of pain on guilty offenders whom they regard - unless it is otherwise demonstrated - to be rational and responsible agents.

Retribution and deterrence are the concepts they commonly refer to in justification of their activities. This brings the fine into focus. For them, the fine is the sanction that is most easily described in these terms. Other sanctions are "marred" either because they are explicitly treatment oriented or can only be realistically used in rare circumstances or after "social work" ideas have been considered. Their use of imprisonment is compromised in part because it is in practice difficult to sentence the type of offender that appears before them for the type of offence they have committed to the prison and also because, before they can do so, they have anyway to resort to social enquiry reports which carry with them a social work ethos. Hence, relative to the other available sanctions, the fine appeals most easily to their general view of the nature of the penal system.

There are a number of other factors which come into operation. For example, the sheriffs placed considerable emphasis on the "voluntary" nature of the fine. They see offenders as having a choice whether to pay. Voluntary payment indicates an acceptance of the "obligations" that committing crimes and offences places on the citizen. This ties in with the sheriffs' view of criminals as rational and responsible actors who have chosen their course of

action. The fine is seen also as a "flexible" sanction that can be adjusted to meet most circumstances. It thus has the dual advantages of being the sanction most consistent with their general views about the penal system and also being practically useful and adaptable.

The interviews show, however, that sheriffs perceive there to be a number of problems with the fine. Because statute requires sentencers to take into account the means of the offender when levying the fine, there arises a tension. The classical views of the sheriffs lead them to place priority on offence related criteria as the most important determinant of punishment. This they see as most likely to maintain "justice". However, the need to adjust fines to offenders' incomes shifts the balance dramatically in favour of offender related criteria (see Black, 1987). As shall be explained, there is a potential for this to corrode the wider views of justice the sheriffs hold. The danger is increased by the facility to pay fines by instalment. Although these two requirements are also rooted in a view of how justice ought to be achieved - the rich should not "escape" punishment nor the poor suffer unduly - and the sheriffs recognise this, they nevertheless perceive there to be a conflict. The idea of proportionality according to offence related criteria can conflict with the idea of proportionality according to offender related criteria. We demonstrate how sheriffs endeavour to resolve this conflict in their use of the fine.

The potential for conflict between these competing ideas of proportionality, and the views sheriffs have of the constraints that arise from the administrative requirements of a modern penal system are examples of another wider theme of this study. This concerns the

role of rationality and different types of rationality in the evolution of the modern notion of criminal law and punishment. In what follows, we endeavour to show both the social context and roots of rationality and the continual tension that exists between its varying expressions. This takes us back to the notion of the normative practice of sentencing because it is within it that one can discern different rationalities at work. The place to begin our argument thus is in a discussion of how we can sociologically characterise a practice.

Rules, Regulations and Outcomes

So far we have argued a general methodological case and for a particular, but as yet an unexplicated, view of the nature of legal rules. What we have yet to do is to describe how rules relate to what we have called the "normative practice of sentencing". This is a crucial issue, as upon it rests our explanation of the way in which sheriffs' decisions to use the fine are rule-governed. There is, however, a problem of logical order involved here. Before we can describe how rules are related to this normative practice, we must first examine the nature of rules themselves; we must examine ways of conceiving of and describing rules.

In his famous paper on the subject, Rawls distinguishes between two conceptions of rules which he calls the summary conception and the practice conception (Rawls, 1967)⁹. We will explore the relevance of this distinction to our subject matter.

According to Rawls, the summary conception of rules involves conceiving of them as summaries of past experience: a rule summarises

what it is we have learnt from making decisions in the past. Each decision is made by the application of a utilitarian principle to the matter in hand. We decide what to do in a case by considering each time the utility of the various alternatives we face. Rules emerge, according to Rawls, in those circumstances where there is a regularity of cases and decisions. As he puts it, "rules are pictured as summaries of past decisions arrived at by the direct application of the utilitarian principle to particular cases" (Rawls, 1967 p.158).

In this conception, the point of having rules is that similar cases tend to recur and that one can save time if one's past decisions are captured in the form of a rule. If there was no regularity of cases then the utilitarian calculus will have to be applied on a case by case basis. But, as Rawls points out, it is part of this conception of rules that the particular case is always logically prior to the rule. This is so, because we will make a decision on utilitarian grounds regardless of whether the rule exists or not. Furthermore, each person is entitled to consider the correctness of a rule and to decide whether it is proper to apply it in a particular case.

Rawls distinguishes this summary conception of rule from the practice conception, which involves seeing rules, not as generalisations from past experience, but as themselves defining a practice. A practice is a form of activity composed of a set of rules. According to the practice conception of rules, the freedom to apply a new principle of utility to each case does not exist; rather already existing rules define how one is to act.

It is a requirement of the practice conception that practices are publicly known and that individuals can be taught how to recognise the

practice, As Rawls puts it,

"Those engaged in a practice recognise the rules as defining it", and "it is the mark of a practice that being taught how to engage in it involves being instructed in the rules which define it, and that appeal is made to those rules to correct the behaviour of those engaged in it." (Rawls, 1917 p.163)

In this conception, rules exist prior to individual cases, and one decides on the basis of applying practice rules to particular circumstances. It does not really make sense to ask if an individual is applying a practice rule to a particular case; to pose this question is to move outside the practice. Practices have an immense authority; they define competences, establish offices and hierarchies. One decides in terms of the practice, one does not decide whether the practice is to be applied. To question the rules of a practice is to move outside it and to take up the position of a reformer. When one accepts an office established by a practice, all that one can do is to describe one's action by referring to the rules which define the practice.

The description Rawls gives of these two ways of conceiving of rules is tied in with another important distinction. He argues that it is always possible to distinguish between justifying a practice and justifying a particular action falling under it. His point is that unless we make this distinction, it becomes impossible to conceive of promising or punishment as institutions. Unless we can separate out the institution of promising or punishing from the particular acts

which fall under them, then we have no conception of them as institutions. Rather, we simply justify each action as it occurs. Promising and punishing are social institutions, as are judging and sentencing. We have a conception of these independent of each act of promising, punishing, judging or sentencing. Rawls' argument is that the summary conception of rules does not allow this distinction to be made. Rather, as its point is to stress the contingent nature of rules, the case by case basis of them, the summary conception suppresses this distinction.

Rawls' argument is of direct relevance to our concerns. Each conception of rules yields a substantially different framework for describing the normative practice of sentencing. If we were to adopt the summary conception of rules, we could not talk of sentencing as an institution; of it as a regular, rule-governed form of behaviour. Rather, we would have to describe sentencing by pointing, for example, to the dispositions of individual judges and their possibly idiosyncratic application of rules on each case that appears before them. Although some members of the judiciary are at times prone to this description, not least because it embellishes their individual powers and competences, it is not one that we claim on the basis of the evidence provided by the sheriff interviews fits the process of judicial decision-making. The implications of the summary conception of rules is that the application of rules is always indeterminate, it can change from case to case. It thus throws the weight of analysis on to particular decisions taken by individual sentencers and leads to the view that legal rules can be overthrown by the sentencer simply by the application of the utility principle; of what the sentencer sees

best to do in the circumstance. Ultimately, this challenges the conception of law as a system of rules existing independently of the particular decision to be taken.

The practice and summary conceptions of rules also deliver very different descriptions of what it is to be a judge. According to the practice conception, judging is an office. It is a position involving the acceptance of certain duties and obligations defined by constitutional law and convention: pre-existing legal rules define the area of competence and define what is regarded as legitimate action. According to the summary conception, these pre-existing rules would have no particular force or priority. Rather, they would be just one set of rules among many which the decision-maker could shrug off if greater weight were to be given to some other set. In this view being a judge is rather like playing a role, a bit part in a play, that can be interpreted with poetic licence. The practice conception of rules is analytically superior precisely because it does give weight to the pre-existing. It allows one to comprehend the institutional nature of the exercise, yet keep a focus on the idea of actors rationally calculating within this institutional nexus.

Rawls' practice conception of rules is very similar to the analysis of law which legal realists such as Llewellyn (1960) or sociologists like Durkheim (1893) outline. Although at points Llewellyn does seem to veer towards an act utilitarian description of legal decision-making this is offset by a naive sociological account of the factors that lead to what he calls "reckonability" in legal decisions. Llewellyn lists fourteen clusters of factors that make for "stability" in legal decisions. Many of these fit well with Rawls'

conception. Factors such as law conditioned officials, known doctrinal techniques, opinion of the court, responsibility for justice, and above all, professional judicial office, are concrete descriptions of the rules which define both the notion of judicial office and the constraints that accompany it.

Similarly, in his discussion of the law of contract, Durkheim (1893) distinguishes between the laws of contract that are applied in a particular case, and the law of contract as a sociological and social institution. Durkheim maintained that as such the law of contract exists independent of its application in individual cases, it is sui generis. Legal rules are as Searle (1967) and MacCormick (1974) maintain "institutional facts". They are social entities which govern the behaviour of those who work within them.

Conceiving of sentencing as a normative practice has certain implications. It shifts analysis away from investigating the "attitudes" and "characteristics" of individual sentencers towards the system of rules that exist independent of them. It requires we conceive of sentencers as actors who work with rules and who, by a process of interpretation, apply them to the business at hand. Furthermore, it requires we conceive of this process of interpretation as itself rule governed.

While this approach moves us away from the type of analysis associated with the empirical/behavioural tradition outlined earlier, some may argue it does so only at the expense of reifying the notion of rules, by turning them into abstract, and immutable "forces" that bear absolutely on the sentencer. Thus, it may be said, the instrumental materialism we objected to in the empirical approach has

simply been replaced by a sort of "rule determinism". Moreover, a further objection could be made. It could be argued that we seem to be moving towards just that portrayal of the legal system as a close knit, hermetically sealed system that we objected to in our commentary on the legal reasoning literature. This seems particularly inappropriate in the area of criminal law because, as has been acknowledged, sentencers always have to come to terms with the particular features of the case before them.

Another way of putting these objections is to say we have to ignore the contribution of a whole body of quite recent sociological literature on the criminal court. There is a tradition which stems from the work of Blumberg (1967) through that of Carlen (1976), Bottoms and MacLean (1976) to that of McBarnet (1981). Although these studies are not directly concerned with sentencing, their general conclusions are relevant and, most important, different in significant ways. The important difference is this. While our argument appears to be moving in the direction of formalism, theirs - which is based also upon observation of the court in practice - with the possible exception of McBarnet, stresses the opposite. This stress is perhaps best summarised in the idea of "negotiated justice". By this is meant that the criminal courts as a whole, and by implication sentencing as well, do work on the basis of rules, but rules which are informal and situational rather than abstract and formal. McBarnet, it is true, endeavours to counterbalance this stress by laying emphasis also on the formal rules of law, but still nevertheless she does portray the court in terms of the relationship between the two. Furthermore, it may be argued, their picture has a ring of truth in relation to the

criminal law as it operates in the lower and middle level courts.

Here the need to keep the "conveyor belt" (Blumberg) going, means the formal rules must be short-circuited if order is to be maintained. A related line of objection can be found in the recent study by Bankowski, Hutton and McManus (1987) of the district court in Scotland, where it is argued that sentencing does not involve using strictly legal rules at all. Sentencing, it is claimed, works in a legal context and has legal implications, but the decisions themselves do not. Rather, the simple pragmatic facts of each case are important. Sentencing is an eclectic exercise of no special relevance to legal reasoning (cf. Walker, 1985 p.117).

It is not necessary for us to reject this type of argument for our case to stand. The analysis of the court in this literature may well be accurate. The court may well work on informal or situational rules. Our point is a different one. We contend that at the point of sentencing, situational informal rules do not form the resource from which decisions are made. At the point of sentencing the sheriff is making a legal decision. That this can involve interaction with the accused is true, what is not true is that this interaction can be the foundation or context of the decision. In making decisions on sentence, the sheriff must have regard to legal rules and principles, as the sentence is justified on these criteria alone. Now among the criteria used in reaching decisions, there may well be those concerned with special characteristics of the offender - "character" or in the case of the fine, income - but this does not mean that the formal rules of law are elided. It is the task of the sentencer to accommodate these characteristics in the decision precisely because

the law requires it.

There is another problem with this line of argument. For example, one of the contrasts Carlen draws between abstract and situational rules is that, whereas situational rules are plastic, abstract ones are not. This is a doubtful contrast to draw. Certain rules may be abstract but this does not stop them being interpreted. Indeed, the application of any rule requires a process of interpretation. In deciding on sentence the sentencer always has to determine if a general rule applies to a particular case and then how to apply it. This is a quintessentially interpretative process; in a sense there are no "easy cases". The point is that abstract rules are not inflexible or inactive in the way Carlen implies. Abstract rules are not a fixed feast in the sense that they are simply "laws or rules in the book". Rather, all rules are open to interpretation - they do not have the all or nothing quality ascribed to them by theorists such as Carlen and Dworkin. But, it may be retorted, how exactly are these rules to be interpreted? Can it not be argued that it is at this stage that the informal and the situational are interposed and taken over? Sentencing in criminal cases does, after all, involve an extended process of individuation, it is inherently open-ended. The sentencer has to come to terms with the particulars of a great number of cases and in doing this the pre-existing general rules may well simply fade into insignificance. Moreover, a proponent may argue, as has already been admitted, there are very few formal rules of law as defined here relevant to sentencing. With the exception of life sentences for murder and a few mandatory disqualifications, there do not appear to be the pre-existing general laws that this argument

implies exist. Thus, if the process of interpretation is open-ended and there are very few formal rules of law, how can there be talk of a practice of sentencing in which general rules are applied to particular cases? Is it not, as the literature just reviewed claims, a process better described as a continual informal negotiation rather than as a practice, as you define it? Moreover, the opponent may further point out, claiming the process to be informal does not mean it is irrational or non-rational. Informal negotiations can be seen to be the epitome of rationality even when the parties involved are in very different power positions. This is a powerful argument which meets the one developed here at every point. It is premised in an assumption that actors are rational agents, it picks up on aspects of our characterisation of law and sentencing, but interprets the process very differently.

The argument derived from Carlen et. al. can be seen as a form of realism, and like the older school of American legal realists,¹⁰ its core contention is that rules and rule application are indeterminate. By indeterminate I do not mean random; randomness means left to chance or lacking in premeditation. Rather, indeterminacy means that there is nothing fixed or certain about what rules will be applied or about the process of application. This stress on indeterminacy links the literature with the summary conception of rules outlined above in that it appears to suggest that sentencers make decisions on the basis of contingent factors which can change from case to case. Of course in one sense this must be true in as much as each case is different. But the argument goes further than this to suggest that any rules that are built up grow out of the contingencies of the situation. They do not

exist independent of it. This is what allows abstract rules to be elided and put to one side. They remain but only as a gloss on what is really happening.

The major weakness of this position is that, as has been said, it puts in doubt the possibility of describing practices as institutions. It leads to a conception of sentencing and other practices as an endless series of isolated acts by individuals who manipulate rules according to the particular context they are in. The problem with this is, like all arguments premised on indeterminacy, it has great difficulty in accounting for broad regularity in human affairs.

The problem is this. If rules and their application are indeterminate in the sense defined, we would expect to see over time a great variation in outcomes. If rules can always be overthrown, if their creation and their application is contingent and variable, then any pattern becomes a problem to be explained. Why out of variability should regularity arise?

This suggests that a demonstration of regularity over time would lead one to question the presumption of indeterminacy on which this literature is based. At this point the analysis of sentencing trends conducted in the last chapter becomes relevant. With the exception of Class I crimes, and then for reasons explained, the overwhelming impression created by our analysis is one of broad regularity even in those Classes where there has been a change in the use of sanctions - for example, the notable increase in the use of the fine in Classes II and III. As was shown, this is a regular, constant pattern - it suggests a change in policy, but one which sheriffs accepted and abided by.

Further evidence of broad regularity is provided by the table

below.

Scotland										Pounds sterling (£)	
Crimes and Offences	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
Total Crimes and Offences	48	49	47	45	45	49	53	53	50	47	47
Total Crimes	83	87	85	77	73	77	88	91	94	73	68
Non-sexual crimes of violence	140	146	152	142	144	142	178	190	202	172	141
Homicide	472	450	517	474	547	524	355	765	663	913	766
Serious assault etc	166	211	250	218	228	269	289	389	239	193	169
Handling offensive weapons	110	113	113	100	98	93	109	112	101	94	84
Robbery	172	155	178	178	130	101	188	212	182	191	167
Other	86	71	53	49	54	51	103	70	75	70	70
Crimes of indecency	75	85	83	72	69	65	94	117	90	62	41
Sexual assault	133	132	174	110	222	128	151	185	196	201	125
Lewd and libidinous practices	96	105	91	91	81	101	113	108	101	94	74
Other	59	65	58	54	45	41	62	106	70	39	32
Crimes of dishonesty	81	85	84	76	71	77	86	89	94	71	67
Housebreaking	120	123	117	110	106	103	122	141	137	116	109
Theft by opening lockfast places	75	85	88	85	74	77	94	106	101	82	76
Theft of motor vehicle	107	120	111	106	96	94	111	115	117	105	94
Shoplifting	59	64	64	55	51	53	66	64	41	34	30
Other theft	59	64	64	55	51	53	66	64	73	54	52
Fraud	87	93	84	84	77	126	81	87	137	74	71
Other	124	111	120	108	101	102	112	134	123	106	100
Damage	55	60	59	57	51	52	63	63	62	54	46
Fire-raising	79	132	221	166	174	97	179	272	175	181	143
Malicious and reckless conduct	55	60	58	56	50	51	61	59	60	52	45
Other Crimes	102	103	93	88	80	85	91	96	87	76	72
Total Offences	43	44	42	40	39	43	45	45	42	42	42
Miscellaneous offences	40	41	40	38	36	44	44	43	40	36	36
Petty assault	73	77	77	74	69	71	92	94	90	76	69
Breach of the peace	48	49	46	44	40	40	46	43	40	34	33
Drunkenness	14	13	12	10	9	9	8	8	7	11	14
Other	31	30	29	27	26	58	35	38	36	32	33
Motor vehicle offences	45	45	43	42	42	42	46	47	44	45	46
Reckless and careless driving	62	60	54	52	49	48	53	55	53	53	54
Drunk driving	129	130	122	118	116	118	127	134	133	131	126
Speeding	26	24	23	22	21	20	22	24	23	22	22
Unlawful use of vehicle	48	51	50	50	48	45	49	47	46	48	45
Vehicle defect offences	33	29	28	27	27	30	32	32	30	28	29
Other	20	21	19	18	23	22	23	23	23	23	24

(1) Adjusted using Retail Price Index.

Extracted from the Criminal Statistics for 1985, this table records the average fine imposed for all crimes and offences and for each Class over a period of ten years. The remarkable finding is one of broad similarity, with the exception of homicide, over the period. For example, the average fine for all crimes and offences remains almost exactly the same (£48 in 1972 and £47 in 1982). This is to be explained by the statistical predominance of the miscellaneous and motor vehicle offences in the overall distribution, where the average fine is approximately £45, but this adds weight to our general argument. Sentencers appear to be fining according to general rules which pre-exist their application to particular circumstances.

Examination of the average fine in the main common crimes, such as house-breaking, theft by opening lockfast places, theft of motor vehicles, robbery and serious assault all show the similar broad consistency over the period. Again this can be taken as evidence of the existence of a practice - a set of rules - governing the use of fines.

Other evidence which supports this viewpoint is that provided by the sheriffs interviewed. Quite clearly, they saw themselves as being bound by rules which both defined the office they occupied and governed the way they sentenced. They did not see the process of sentencing as indeterminate, which is not to say they did not tailor sentences to the individual offender. Rather, as was said before, they described the "trick" of sentencing as incorporating such factors into the general rules they saw as existing.

It appears to be difficult to square this evidence with the stress on indeterminacy that one finds in the realist literature. The

evidence supports the strength of the practice conception of rules and thus the existence of what we have called the normative practice of sentencing.

One of the difficulties with the realist literature is its level of analysis. For example, Carlen's work is focused on the micro level of interaction. This is perfectly reasonable, but the finer the analytical lens is, the more the general picture goes out of focus. Details can become over-emphasised at the expense of losing sight of the broader canvas. Moreover, on closer examination, this literature can be seen to converge with the practice conceptions of sentencing outlined here. For example, Blumberg describes the court and the criminal justice system as a "conveyor belt" aimed at maximising the speedy dispatch of cases. This encourages the growth of guilty pleas and plea bargaining which short circuit, so he says, the due process or adversary model of justice. For Blumberg this short circuiting indicates a failure in the system. Similarly, although, as we have noted, with greater emphasis on the formal rules of law, McBarnet paints a similar picture - the preponderance of guilty pleas means the system works against the defendant.

There are two comments to make here. First, it is quite wrong to see the use of guilty pleas as evidence that the system is necessarily unfair and elides rules of law. The right to plead guilty is part of the due process model of law. Second, and more important in our context, both Blumberg's and McBarnet's analyses can be transposed into our framework and vocabulary. What both do is to describe a practice at work. The "conveyor belt" is a system or rules. The rules are not the ones which Blumberg presumes ought to be in use, but

this does not mean that the system cannot be described in these terms.

This last point brings into focus, however, an important issue. This concerns the nature of the rules which make up a practice. One valuable lesson that can be gleaned from the realist literature is that rules and rule following behaviour are more plastic and fluid than is suggested by the discussion of them out of their social contexts. We must be careful here neither to give unwarranted praise to the realist literature nor by implication to damn any discussion of rules that does not use their type of methods. In the most abstract and "philosophical" discussion of legal rules, there is allowance made for their interpretable nature. Hart (1961), for instance, distinguishes between two aspects of any rule; the "core" and the "penumbra", in order to show the open-endedness of rules and the language in which we talk of them. Also MacCormick clearly states, in a slightly different vein and with Humean overtones that "reason alone cannot wholly determine what we ought to do" (MacCormick, 1978 p.264). On the other side, there is a tendency for realists to assume that abstract rules - the law in the books - are beyond interpretation and that is why informal ones grow up in practice to take their place. One problematic consequence of this is the suggestion, sometimes explicit, other times made by implication, that there is a "gap" between the theory by which the system ought to work and its day to day practical nature. As Skolnick has suggested, this idea is often argued for by misinterpreting Packer's famous distinction between the "due process" and "crime control" models of the criminal justice system. The realists use these models in support of the idea that a gap exists - that the criminal justice system is oriented only to

crime control. However, Packer never argued that the models were dichotomous, rather he was trying to point to a possible tension between the substantive aims or purposes of the system and its bureaucratic/administrative constraints.

Nevertheless, the realist literature is valuable in making us more aware and sensitive to the fact that rules exist in social contexts and that this cannot be ignored if we are to understand the nature of the criminal justice system.

It is partly in consequence of this and also because of the already noted openness that inheres in the process of sentencing, that we distinguish between two sorts of rules, the formal legal and the substantive. As was explained in the introduction to this chapter by formal legal rules we mean those rules of law enshrined in statute or in an accepted common law practice that gives direction to sentencers. Substantive rules are more diffuse and elusive; they can be seen as policy directives; they encapsulate the ends sentencers perceive the system ought to achieve. The existence of a "tariff" in Scots criminal courts (see Nicholson, 1981) is a good example of substantive rules in operation. Equally, the presence of "sentencing guidelines" in England, laid down by ~~the~~ Lord Chief Justice, is another example of how substantive rules directly effect sentencing. The tariff and the guidelines are expressions of values held to be the foundation of policy; they are built up over time and reflect the "collective experience" of the judiciary, but they are not in the sense defined here, for real legal rules. There thus exist few formal legal rules explicitly about sentencing that "tell" sentencers what to do. More normally, the formal legal rules are concerned with procedure,

evidence and jurisdiction. One formal legal rule that does have considerable consequences for the system is the statutory requirement that, in setting the level of the fine, the sentencer must take into account the means of the offender. In the next chapter we consider these consequences and discuss their implications.

In passing sentence, sentencers bring these rules into relationship with one another. The calculation usually proceeds on substantive grounds - this is how the sentence is individuated to take into account the specific features of the case. However, this process is bounded by formal legal considerations. To use a Dworkinian concept, formal legal rules "trump" substantive ones. The degree to which substantive grounds are considered varies by the type of case. For example, in motor vehicle offences, the extent to which offender related criteria are considered differs greatly from that in a common law crime like theft or robbery. Again, procedure can have a direct influence. The formalities that accompany cases taken on indictment mean the two types of rule are brought into a different relationship than they are in the more relaxed circumstances of summary procedure.

In the next chapter we discuss these matters in greater detail. There are, however, a number of more general issues that warrant discussion here. First, as our brief discussion of substantive rules shows, it is clear that they are not precisely legally formulated ones. They would not meet the sort of test for being a rule that, for example, Dworkin lays down. Rather, they seem more akin to his notion of principles and policies. Why therefore should we not use these terms? Does it help or add light to insist that they be called rules?

While not wishing to deny that there are differences between

principles and rules, it must be pointed out that the adoption of Dworkin's terminology is inappropriate. It ought to be remembered that Dworkin develops his distinction between rules and principles in the larger context of his debate with legal positivists and in particular with Hart. Dworkin attempts to subvert Hart's rule based characterisation of law by arguing that principles do not exhibit the formal requirements of rules as Dworkin himself defines them - that is, a rule must specify all the exceptions to which it is subject (Dworkin, 1977 p.24ff). In claiming to show that in hard cases recourse is made to principles rather than rules, Dworkin purports to have demonstrated that law cannot be described only as a system of rules.

Even if we put to one side the assessment of Dworkin's argument - and here MacCormick is surely correct in claiming that it exaggerates its case (MacCormick, 1978 pp.153-155) - there is no reason for us to take on board Dworkin's terminology. It has not been our concern to argue the case for or against the adequacy of legal positivism as a description of law. Not only is this better left to others more skilled and knowledgeable in the area (see Simmonds, 1984) for example) but our project is more limited. It has been to evolve a way of conceptualising sentencing against the backdrop of its inadequate conceptualisation in the existing literature. That at points this feeds off a more general conception of the nature of rules and law is conceded and discussed, but that this means we need to adopt a particular vocabulary with all that this entails, is not. Our characterisation of substantive rules, however, is comparable to Dworkin's notion of principles. Substantive rules do encapsulate

views on the fundamental nature of the system - in this context, the views sheriffs have of the criminal justice system as achieving justice by the meting out of classically conceived punishments. But this comparability does not mean we have to limit ourselves to a vocabulary taken out of the context of a debate between jurisprudes.

Furthermore, if justification is needed for describing substantive rules as rules, then there seems to be no inconsistency between say Hart's notion of what a rule is and our claiming substantive rules to be rules. Hart develops his notion of rule by contrasting rules with habits. Habits he casts in a behavioural language - they are patterns of behaviour regularly repeated over a period of time. They differ from rules in three ways. First, breaking the rule of a group invites criticism whereas this is not the case with habits. Second, this criticism is perceived by the group as legitimate and justified. Third, and most important, rules have an "internal" aspect; following rules as distinct from habits necessitates consciousness and deliberation. Rules thus set a standard which a particular group recognises and which individuals consciously accept as legitimate.

Our description of substantive rules meets these criteria. Substantive rules are generally shared norms which individual sheriffs intentionally accept. They rationally use them in making decisions; deviation from them can be a ground for criticism. (Although the sheriffs we interviewed did not "name names", they did occasionally allude to the "deviant" behaviour of some of their colleagues).

This comparison should not be taken to indicate an acceptance of legal positivism. There is nothing in Hart's notion of what

constitutes a rule which restricts it to this particular perspective. A Weberian social scientist - or a Durkheimian one for that matter - would find little to disagree with in it. The comparison simply shows that, in principle, there is no reason not to describe substantive rules as rules.

There is another general point that ought to be considered. There could be those who feel able to accept my argument, yet claim that it fails to demonstrate that sentencing has any relevance to legal reasoning. Such is the case Bankowski et. al. (1987) put forward. They argue that sentencing does not ~~really~~ involve legal reasoning; rather it is a matter of sentencers using their commonsense to achieve certain ends. Thus it may be rule governed but the rules are not legal ones. Moreover, the weight placed on substantive rules in our argument is evidence of this. (cf Willock 1987 pp 115-116)

The question raised here concerns the extent to which one can describe rules which are not formulated in specifically legal language as legal rules.¹² One's answer to this question will depend in turn on where one draws the line between legal language and other generally available but related vocabularies. There is a danger of drawing this line too tightly or too broadly and this issue is not amenable to an easy answer. It is a matter of judgement. However, what is clear is that sheriffs do see their sentencing as a form of legal reasoning. Their actions were premised on the assumption of them being legal actors pursuing justified and justifiable ends of the legal system in which they work. Factors like a concern for justice, or of the priority given to punishment over other ends, were all seen as being part of legal culture as they understand it. They were also aware

that these values were shared (or not) by members of the community at large. But this is hardly a strong ground on which to argue that the form of reasoning in which sheriffs encapsulate these values is not an example of legal reasoning. These values, crystallised in what we have called substantive rules, are active in the criminal justice system and thus must be considered an essential part of its operation.

Perhaps the difference between the account developed here and that developed by Bankowski et. al. can be partly explained by the fact that their survey was concerned with lay justices while this one is with fully trained members of the judiciary. The fact that sheriffs are professional judges is important. Sheriffs are a product of a long tradition. They learn and are taught the rules, the ethos of Scots Law, from the point they enter into legal training, then go on to practise as lawyers and this is continued on their appointment to the bench. This training is the process by which the rules of the normative practice are learnt. What the work of Bankowski et. al. shows, however, is that the normative practice we describe has "local conditions of existence", in the sense that it most probably does not exist, at least in the same form, in other courts with different personnel and jurisdiction.

We claim therefore there exists a normative practice of sentencing in the Sheriff Court in Scotland that is amenable to investigation and empirical description. The rules that compose the practice can be described as can be their effect on the use of sanctions.

It is at this point that the concerns of this chapter clearly intersect with the broader themes of our inquiries. It is through the

rules that make up the normative practice of sentencing that the broader and more general social forces discussed earlier in the study are transposed into a reality in the everyday workings of the contemporary Scottish criminal justice system. It is through these rules that different forms of rationality become operative in the processing of criminal cases. By studying how sentencers use these rules, we can enlarge our vision of the way punishment, money and legal order intersect.

Conclusion

This chapter has served a number of purposes. First, it is a transitional one joining together the statistical analysis of the last one with the phenomenological analysis of the next. It has gone about this by developing the notion of a normative practice. Second, it has sought also to contribute to the more general literature on sentencing. Its third purpose has been to prepare the ground for the detailed examination of how different forms of rationality co-exist within the criminal justice system and how the use of the fine reflects and is structured by them.

Working Legal Rules: Money and the Sense of Justice

In this chapter we will use the interviews with sheriffs to analyse empirically the process by which they "construct" fines. As was pointed out in the last chapter, the fine is constructed out of the relationship between formal legal rules and substantive rules. While formal legal rules are the backbone of the normative structure of sentencing - they set the parameters within which decisions have to be made - substantive rules set broad, general policy objectives. The relationship between these rules is complex and, to an extent, changeable. Priority is placed on one type as against the other, depending on the nature of the problem with which the sheriff is faced. If a question of law, procedure or evidence is raised then priority will naturally be given to formal legal rules. When no such technical matter is at issue, then substantive rules are to the fore. Substantive rules, however, can always be trumped by formal, legal ones. The decisions made have to be consistent with what the law requires.

In what follows we examine how these types of rules operate and their relationship to the fine. We explore, also, the influence that money has upon the process. Does the monetary nature of the fine introduce a special factor in making decisions on sentence, or is it of no special significance at all?

We begin, however, by looking again at the distinction between formal legal and substantive rules. By formal legal rules we mean rules that are contained in statutes and in the common law. They

describe in varying degrees of specificity, the circumstances in which behaviour can be regarded as unlawful. They do not describe the behaviour itself but the circumstances. A law which says driving in excess of thirty miles an hour is illegal does not describe what it is to drive under or over the limit. Rather, it establishes that to exceed thirty miles an hour is a circumstance in which you may be regarded as engaging in unlawful activity. Formal legal rules also set up criteria which describe what sort of knowledge is accepted as valid in legal argumentation. Formal legal rules, in this sense, describe procedures to be followed as in the case, for example, of laws regarding evidence.

In the area of sentencing there are few of these types of rules. As we said in the last chapter, there are few "laws of sentencing". Statutes may set upper limits on fines or sentences of imprisonment, but in common law crimes and offences there exist only conventions as to what sanction is appropriate. The court may make reference to its past practice but precedent is not binding.

Substantive rules differ from formal legal rules in that they state broader, policy objectives. They are also themselves policy statements. Substantive rules can be more or less general in nature. For example, with regard to the fine, rules range from general statements about the purposes and objectives of punishment, of the nature of the fine as a punishment, to more specific rules that describe what the "going rate" of fine is for particular types of crimes and offences.

These substantive rules express values which the community of sheriffs recognise. Most sheriffs, for example, hold to a retributive

justification of the fine because they see this as the best way of achieving justice. There is a broad consensus that the proper place to begin setting the level of a fine is by relating it to the seriousness of the offence. In doing this, sheriffs see themselves as "pricing harm" and establishing "balance" (Sh.1). This "modern retributivism" (see Finnis, 1983) comes through in other rules such as "the offender ought not to profit from his crime" (Sh.3).

These substantive rules are part of legal culture. In sociological terms they are an "occupational norm". Sheriffs do not consciously learn them on appointment to the bench; rather these rules are learnt as part of the process of becoming a lawyer.

Although these rules are part of legal culture, this does not mean that sheriffs are unthinkingly or absolutely committed to the values they express. Individual sheriffs may be "lukewarm" about certain rules. A few, for example, do not strongly advocate a retributivist justification of the fine, preferring to see its use more as a type of "social work for the community" (Sh.8). Yet again, other sheriffs offer other punishment justifications of the fine, such as deterrence; they see it, for example, as "a signal to the community" (Sh.9).

The plurality of values is to be expected in any occupational group. The normal situation is for any individual to be oriented to a variety of different ends at any one time. Thus, it is common for individual sheriffs to give a number of different justifications of the fine but the general tenor of the interviews showed that the central or standard justification was that which emphasised the fine as a punishment. The predominant justification therefore was to see

the fine as a retributive measure or as a form of deterrence. The occasional "treatment" justification was cast not so much in the terms we have come to expect, but far more in a framework which sees the fine as a form of financial discipline.

As part of legal culture, these substantive rules are brought to bear on the question of how to sentence. It was said in the last chapter that in the realities of the courtroom, on a day-to-day basis it is these substantive rules that "operate" the process of sentencing. Sheriffs assume the validity of formal legal rules and deal with cases by substantive rules. However, no matter how pressing the constraints of everyday courtroom life may be, it is formal legal rules that set the boundaries. As sentencing decisions are legal decisions, they must be legally valid. Ultimately, formal legal rules can trump substantive ones.

It would be wrong to perceive of the relationship between these two types of rules as though it were a choice of either using the formal legal or the substantive ones. Rather, they are in a constant relationship with one another. While substantive rules may be the process by which general rules are applied to particular cases, the formal legal rules provide both the starting and finishing points. The rules thus operate together: they are not mutually exclusive.

This distinction between formal legal and substantive rules is analogous to Max Weber's famous distinction between two types of rationality; formal and substantive. For Weber, formal rationality was action governed by rules, where the orientation towards rules is of a logical type. One accepts the rules because they are rules. In formal rationality, the selection of means and ends is rule

determined. Substantive rationality, on the other hand, is that in which some value - which for Weber was absolute - defines the ends of action: social action premised not upon following rules but achieving some objective that is valued beyond any particular set of rules.

The similarity between the distinction we have drawn and Weber's is readily apparent. Formal legal rules are formally rational in Weber's terms. Substantive rules, because they express policy or value ends, are substantively rational. There are two points to make in qualification however. First, the distinction between formal and substantive rationality or between formal legal and substantive rules is not an absolute one. As has been argued in many discussions of Weber, the distinction is one of stress rather than exclusion. In Weber, the distinction appears to depend upon the absoluteness with which the ends of substantive rationality are held. The orientation to the substantive end will outweigh any calculation of means. This compares to formal rationality in which there is a reasoned calculation of ends and means. However, the belief in the adequacy of reason cannot itself be described as a formally rational belief. Formal rationality, in other words, rests on substantively held beliefs. If this is so then the distinction cannot be absolute. Formal and substantive rationality do not exclude one another. Rather they exist in a variety of relationships to one another.

Similarly, in our analysis, formal legal and substantive rules are not mutually exclusive. Substantive rules are not technically rules of law, but as they, in part, structure how law operates, they are legally relevant. They belong to legal culture and thus share in common some aspects of the rationality of law. Moreover, some of the

values that inhere in substantive rules appear to be so central to the practice of sentencing that they have an influence on the system that is as determinative as that of a formal rule of law. For example, the idea that the fine ought to be proportionate to offence and only adjusted to income, or that the fine is best justified as a form of retribution, or that offenders ought not to be allowed to profit from crime, are central to the legal culture of sheriff. These substantive rules have an immense affect on how the fine is used.

Our second general qualification concerns the boundaries of substantive rationality. In Weber's account, the ends of substantive rationality are held with a commitment that outweighs calculation of means. Quite clearly, it is not possible for a sheriff to be so absolute. Formal legal rules, as we have said, trump substantive rules. Thus, if there is a tension between rules, it will be the formal legal rule that is ascendant. This does not mean that the formal legal rule remains uninfluenced by the substantive rule: the substantive rule will set the criteria by which the formal legal rule is interpreted - rather it is that the substantive rule must ultimately "fit into" a formally legal proposition. This is so precisely because the sheriff is a legal actor, holding a public office, which requires recognition of the binding force of the rule of law. Moreover, we do not deny that the rule of law is an example of substantive rationality. What we would deny however is that this challenges our analysis. The observation that formal rationality or formal rules rest upon a foundation of substantive rationality is an example of the complex relationship that holds between them.

The normative practice of sentencing is composed of these two

types of rules. Fines are constructed out of the relationship between formal legal and substantive rules. These rules are neither background expectations, in the sense of Hogarth's penal philosophies, or inputs in the sense of Hood's model of sentencing. They are rules that exist independent of the sheriffs that use them. These rules are the structure within which sentencing decisions are made.

Our task is to describe empirically how these rules operate in the context of fining. We begin our analysis by looking at general substantive rules that record the views sheriffs have of the fine as a type of punishment. These rules have a profound influence both upon sheriffs' views of the general policy objectives of fining and of how the fine relates to other sanctions.

Punishment, Regulation and the Fine

All sheriffs interviewed held two clear conceptions of the nature of the fine; that it is a definite punishment and that it is a flexible penalty.

The first of these conceptions was a dominant theme. Sheriffs argued that the penological objectives of fining were clear: the fine has to be understood as a punishment. For example as one sheriff put it, "the fine is pure punishment" (Sh.3), or again, "the fine is a punishment, it involves shouldering the recalcitrant into compliance" (Sh.4).

Sheriffs were concerned to distinguish the fine from other available sanctions on these grounds. There was a consensus that, whereas with sanctions like imprisonment other penological objectives like reformation or rehabilitation have to be considered, this is not

the case with the fine. This view of the fine was expressed most clearly by one sheriff, who argued that "the fine is punishment, it is not rehabilitative" (Sh.5).

This conception of the fine was used to distinguish it from the other monetary penalty, compensation orders. Sheriffs generally did not welcome the introduction of compensation orders. Most agreed that "compensation is a complication" (Sh.10). It introduces "a civil action into a criminal trial" and thus there was an expressed "reluctance" to see it "grafted" onto the criminal justice system.

While sheriffs agreed that the fine is a punishment, there was a variety of views on how best to justify it. Generally, in using the term punishment, sheriffs appeared to mean retribution. This is the central case. The fine involves "a routine pricing of injury and damage" (Sh.4). By paying the fine the offender is both punished and the balance of harm restored. Sheriffs were divided on whether the fine can be used as a deterrent. For some, as the "fine relates primarily to the circumstances of offenders, it is not a general deterrent" (Sh.7), while for others,

"the first consideration is denunciation - how bad is it in the public eye. Other things being equal, the fine is determined by this. In so far as the fine is deterrent then general deterrence is uppermost." (Sh.8)

Both the retributivist and deterrence justifications were seen to connect with the priority given to making the amount fined reflect, in principle, the seriousness of the offence. As one sheriff put it,

"subject to statutory and conventional limitations

there is a basic equivalence between the extent of damage and the amount of the fine." (Sh.4)

While not all sheriffs were so clear that offence related criteria should come first, this was the prevailing point of view.

The concept of the fine as a punishment was related by sheriffs to two other characteristics. First, all sheriffs saw the fine as a flexible sanction. Second, the emphasis on punishment was connected with the idea that there is a central, voluntary element in the fine.

Sheriffs regard the fine as flexible in two senses. First, it is seen as capable of fulfilling all the objectives of punishment. The fine can be justified as a form of retribution or as a deterrent or as a denunciatory punishment. As one sheriff put it, "the fine can achieve all the conventional objectives of sentencing" (Sh.2).

Sheriffs thus were aware that it is possible to justify the fine in terms of differing conceptions of punishment, but their main concern is to affirm its straightforward, simple punitiveness. One sheriff commented,

"In ninety-five per cent of situations the fine is purely punitive, there is no reformative or rehabilitative element." (Sh.8)

The fine ~~seems~~ seems to be favoured by sheriffs precisely because of this. As for them it is a punishment, it appears to satisfy their cultural expectations of what sentencing policy ought to be like. Its apparent ideological purity recommends it to sheriffs. But as well as being ideologically "pure", it is also ideologically flexible. Sheriffs do not need to justify it just as retribution; deterrence or denunciation will do as well.

The second sense in which sheriffs perceive the fine as flexible is that it allows them to deal with a wide range of different circumstances. Sheriffs argued that it is possible to adjust the fine to most situations. One sheriff captured this by contending that "the fine is a form; its content and its effect is random" (Sh.4). This was seen to be of particular importance as it allows sheriffs to incorporate in the sentence both factors relating to the individual offender and yet maintain consistency with wider objectives. The fine, in other words, is seen by sheriffs as allowing them to both individuate punishment, yet still keep intact their conception of the wider purpose of the penal system, that of justice. The actual way in which sheriffs do this is to manipulate either the size of the fine or conditions of payment or both. Moreover, the fine is seen to retain this flexibility after implementation - there is a further possibility of adjustment if the problem of default should arise. This appears to be the reason why sheriffs, while perceiving default procedure, as one sheriff put it, "distasteful" (Sh.2), still nevertheless are reluctant to lose their control over the process. One consequence of this is the somewhat ambivalent attitude amongst sheriffs over the advantages of fine enforcement officers. As the same sheriff commented, fine enforcement officers are "a drift toward social workers control" (Sh.2). This sheriff also expressed similar views on the already existing practice of fine supervision orders.

Although this particular sheriff expressed views on "social workers" with pronounced vigour, the reasoning that lay behind his pronouncements was shared by other sheriffs. The fine is conceived by them as having a voluntary element - "the voluntary element in paying

finer is crucial" (Sh.2). This aspect of the fine is tied in with their conception of it as "pure punishment". Sheriffs have a "classical" attitude towards crime and punishment. Crime is perceived as an intentional act to cause harm, which is best dealt with by sanctions which allow offenders to expiate their guilt in a rational and responsible way.

Sheriffs argued that because the fine is paid in money, it provides the offender with the opportunity of behaving in a responsible, reasoned manner. The financial discipline required by the typical offender - who will be low paid or unemployed - to pay the fine is seen by the sheriffs to have value. In the context of a limited budget, it requires them to give up goods they otherwise would have enjoyed. This both makes the fine hurt and is seen to remind the offenders of their duties as citizens. Sheriffs are aware there is always a choice offenders can make not to pay the fine. The fine allows the opportunity of "atonement" (Sh.1). It also allows the offender to recognise obligations.

There is another dimension to the general perceptions sheriffs have of the fine. Sheriffs draw a distinction between regulatory offences and "real crime". Even those sheriffs who regard this distinction as "useless" (Sh.5) still recognise it. The importance of this distinction is that for some sheriffs it provides the occasion on which their view of the fine as punishment may change. For some sheriffs, regulatory offences, moving traffic and other breaches of statutory provisions, are not really "fined". The money paid is more akin to a post hoc tax or licence fee.

For sheriffs who adhere to this view, certain consequences

follow. Where it is considered more of a licence fee than a punishment, sheriffs use a formal, but rule of thumb, tariff to set the size of the penalty. So many miles an hour over the speed limit will result automatically in a fine of a certain size.

Characteristics of the offender, including income, are seen as relatively unimportant. For example, one sheriff argued that "television licence fines are not increased to take account of means, because the licence is the same for all" (Sh.6).

Sheriffs who advocate this way of looking at things do not see the "fine" in these circumstances as punitive. The penalty is not intended to hurt, but merely to mark a form of disapproval.

Other sheriffs recognise the distinction but it does not alter their perception of the fine as punishment. As one sheriff put it, "even in regulatory offences the fine is purely punitive" (Sh.8), or another "there is a division between regulatory offences and real crimes but the fine is a punishment for both" (Sh.2).

Although there is an ambivalence amongst sheriffs on the implications of this distinction, there is a general consensus that many of the regulatory offences that appear before the court ought not to be there. They constitute "trivial business" and the "should be removed" (Sh.1). As an example, this sheriff mentioned television licence "dodgers" who were seen as "not suitable candidates for fining" (Sh.1).

Furthermore, sheriffs were opposed to the criminal prosecution of social security fraud. They felt that the criminal court was being used to provide "free diligence" for the Department of Health and Social Security (Sh.9). One argued that the D.H.S.S. ought to

"collect its own debts" (Sh.6). Although not all sheriffs agreed with this, it does represent the generally held view. Those sheriffs who were not against such prosecutions per se, supported them only because to offload them would place them outwith "the sheriff's humanity" (Sh.2).

The differing views of sheriffs on whether, for regulatory offences, the fine is a licence or a punishment is of significance. For those sheriffs who see fines as licences it means the whole process can be far more automatic than when dealing with "real crime". They can place the offender within the tariff without worrying about the consequences of their actions. Experience stands them in good stead here. The majority of statutory offences they deal with are motoring offences. As Bottoms (1973) has argued, there is a good chance such offenders will pay. This, in part, is because of their class background, in part, because it is not unreasonable to suppose that offenders themselves see fines in this area as "licences" rather than punishments. Whatever the reasons may be, sheriffs with some justification can assume that default is less likely. Reflection on consequences thus seems not to be necessitated.

As offenders will probably not appear in the court in these cases, the automatic nature of the process is reinforced. Most offenders of this type plead by letter. Invariably, it is a guilty plea, perhaps with some attempt to put forward mitigating factors. Sheriffs listen to or read these pleas in mitigation, but this rarely appears to alter the size of the fine.

The organisation of court business is another consideration that further reinforces the automatic nature of the process. Pleas by

letter are taken at the end of business. Typically, the court is empty except for the sheriff, the fiscal, the clerk and the court attendant. The clerk reads the name of the offender and hands the sheriff the complaint, the fiscal briefly indicates the circumstances of the offence, the sheriff makes a decision. The speed with which this is carried out is interrupted only if some "unusual" claim is made in the letter. In these circumstances, the fiscal may comment, the sheriff may ask a question, but the whole process is still extremely speedy.

Sheriffs who perceive fines as licences justify their decisions in terms of their perceptions of offences. They do not see regulatory offences as "real crime". These sheriffs do not consider that these offences raise or involve moral issues; real crime does and thus merits a punitive stance. Because of this, sheriffs seem to view their decisions about this type of statutory offence as being more administrative than justiciable in nature. By this is meant they deal with such statutory offences by what they see as a straightforward application of general rules to a particular case. The circumstances of the offence and the offender are not, in principle, important and nor is there an issue of law involved. Indeed, it is this which leads some of these sheriffs into arguing that some statutory offences do not belong in the court at all. However, as these statutory offences constitute the major part of court business, they are best dealt with in as routine and mechanical a manner as possible. For the sheriff, this means considering the offence only and relating it to a penalty within the "going rate" or traiff. One consequence of this is that these sheriffs are more likely to give fines at the lower end of it.

For these sheriffs, cases thus are of two broad types. On the one hand, regulatory statutory offences and, on the other, real crimes. For the first a tariff is employed, for the second a more punitive stance. Decisions in the former are administrative in nature, those in the second justiciable.

For these sheriffs who see the fine as punitive there is no necessary conflict between this and processing offences in a routine manner. These sheriffs can retain their emphasis on punishment and also process statutory offences in the way described above. Their difference with the other sheriffs arises in them not seeing decision-making in this context as administrative in nature. Because statutory offences are the business of the court, decisions on them are justiciable. However, these types of statutory offences are regarded as relatively trivial and thus, in a sense, easy cases with which to deal. As they are easy they can be processed quickly. Although these sheriffs concede that some of the statutory offences should be removed from the court, they argue that whilst they remain part of the business, they must be dealt with in a punitive manner. These sheriffs thus maintain an emphasis on speed and routine with an emphasis on using the fine in a punitive manner. They perceive there to be no strain or contradiction.

These sheriffs also use a tariff for statutory offences. Where they may differ is that they are more likely to place the fine at the upper end of the tariff so as to emphasise punitiveness.

Whatever view sheriffs take on this question does not challenge their general conception of the fine as a punishment. The disagreement lies not in how sheriffs perceive the fine, but in how

they interpret the nature of the court's business. It is this commonly shared perception of the fine as punitive which underpins their use of it. In as much as this perception is dominant, sets a standard or is a maximum, we can talk of it as a rule. In our terms, it is a substantive rule. Like other substantive rules it is open-ended and subject to interpretation. It does not have the apparent precision of formal legal rules, but it is a rule nevertheless. The conception of the fine as punitive serves both to set policy ends and to distinguish the fine from other available sanctions. In the latter sense it categorises; it establishes principles which demarcate it from other penalties. This general conception of the nature of the fine structures how sheriffs use it when faced with particular cases. We will examine this in a number of contexts, beginning with how the fine is perceived in relation to other sanctions.

Flexibility and Generality

We established earlier that sheriffs perceive the fine as a flexible sanction that can be used to deal with most circumstances. It can be used to accommodate the particular features of specific cases without this contradicting the perception of it as punitive. Also, in theory the fine can be used for all crimes and offences with the exception only of murder. There exists a group of crimes and offences, however, where the sheriff has to choose between alternatives; either the fine can be used or recourse can be made to the sanction of imprisonment. How do sheriffs deal with these cases? How do sheriffs choose between the fine and its alternative?

Much rests upon the place sheriffs give to the fine in relation

to other sanctions. Here sheriffs are clear. The sanction which first comes to mind is the fine. A selection of sheriffs' comments makes this clear, "the fine is the first thing to consider ..." (Sh.3), "the fine is the first and the commonest disposal" (Sh.10) and "the fine is the first option" (Sh.8).

In part this view of the fine rests upon their perception of it as being more flexible than other sanctions, especially prison. The prison incarcerates and thus removes the possibility of doing anything else with the offender. The fine does not. It leaves open the opportunity in the future of imprisonment, if default occurs. However, this is only part of their argument, for their decision rests also on how they perceive the prison and the fine to relate to one another. There is an interesting difference here. Again sheriffs divide into two groups. The first distinguish sharply between the fine and the prison. Those in the second group see the two as shading into one another.

The opinions of those in the first group are concisely summarised by one sheriff who argued that "the fine is clearly distinct from imprisonment, it is easily demarcated ... marginal cases do not exist" (Sh.6).

Sheriffs who distinguish thus clearly between fines and imprisonment maintain their argument even in circumstances where they give large fines. "There is no crossover from large fines to imprisonment" (Sh.9). The reason given is that, as one sheriff put it, "the link between the fine and imprisonment is completely unnatural" (Sh.6).

Sheriffs in this group see the fine and the prison as serving

different functions. Sheriffs perceive the prison as suitable only for the most serious of crimes. It is only the "wicked" who deserve imprisonment. The "feckless and women" can be dealt with by a fine (Sh.3). There are other factors which make the use of imprisonment more likely. One sheriff said that "individual violence or the use of a weapon leads to an increased likelihood of imprisonment" (Sh.2).

Sheriffs regard these as "special circumstances". It is only when there is a factor which clearly differentiates an offender or a crime from the normal ones, that prison is to be used. This suggests that for this group of sheriffs, the prison is a residual category in sentencing terms. The normal run of crimes and offences and offenders can be fined, whereas the "unusual" and serious are more likely to be dealt with by the prison.

For this first group of sheriffs, the use of the fine and the prison rest upon very different criteria. The use of the prison can be justified in only very special circumstances. Consequently the fine occupies a central place. Its flexibility, its "universal" nature makes it the normal sanction to use for the typical case.

For the other group of sheriffs there is a much closer relationship between the fine and the prison. As a result, they are much more likely to impose a sentence of imprisonment. This, of course, does not mean that they will inevitably do this, because for all sheriffs the fine is the first penalty to be considered.

These sheriffs see the prison and the fine as closely related on practical grounds. The fine and the prison shade into one another when, for example, a particularly high fine is seen to be appropriate. In this situation, the sheriff is likely to sentence to imprisonment

if it is thought that there is a high risk of default. As one put it, "if a fine is unrealistic, then impose a custodial sentence" (Sh.5), or again, another sheriff, "if the sheriff suspected in advance that the fine will be defaulted and the offender go to prison, then he would not have fined in the first place" (Sh.7).

This is a good example of how sheriffs reason consequentially. They sentence by forecasting the likely consequences of their decisions. In this example, they sentence by relating the size of the required fine to the means of the particular offender. If they conclude that, for all practical purposes, the fine is not likely to be paid, it is considered better to use the prison in the first place.

Other sheriffs in this group see the problem rather differently. For them there do not exist clear cut-off points in the use of sanctions. Rather, sanctions are arranged on a scale. As one commented, "there is a continuum from absolute discharge through to prison" (Sh.4). They place offenders on this continuum by looking at the nature of the offence and the record of the offender:-

"It is the situation - record, gravity of offence
- which determines the fine or imprisonment."

"Shading of a fine into imprisonment is very
unusual; therefore, the fine is a limited
alternative to prison." (Sh.6)

"The fine and the prison shade into one another;
more often, however, prison shades into the fine."
(Sh.5)

Sometimes, but rarely, the community service order is used. One sheriff saw the community service order as a "buffer" between the fine and the prison. However, most sheriffs rejected this because as the community service order can only be used when a sentence of imprisonment was competent, it was incorrect to use it for any other purpose.

Although there is this internal variation of opinion on the relationship between the fine and the prison, it is clear that for sheriffs as a whole, the fine is the preferred sanction whenever it is possible to use it which is in the vast majority of cases appearing before them. The central position occupied by the fine is the product of formal legal and substantive rules. Formal legal rules restrict the use of the prison. Prison is a mandatory sentence only for murder. At the other end of the scale, the majority of statutes conclude for the fine. In the majority of common law crimes a discretion exists. Sheriffs interpret their discretion by operating substantive rules. These rules describe both general policy objectives, and also contain more specific recommendations on particular sanctions. The fine, because it is "flexible" and "universal" is the comprehensive sanction. As a result, recourse to the use of imprisonment is rare; the system works in favour of the fine. For sheriffs this is a way of maintaining their belief that the penal system ought to be punitive.

Setting the level of the fine

In this section we wish to explore the way in which sheriffs construct the actual level or size of the fine, how they conclude for

a certain sum of money. This question lies at the heart of the fining process. Moreover, it is important for our analysis as there exists a tension between formal legal and substantive rules at this point.

It is a statutory requirement that in setting the level of a fine the sheriff takes into account the means of the offender. This does not mean that the fine ought to reflect just this, but that it is necessary for the sheriff to consider information about means in making decisions.

The reasoning behind this requirement is to ensure that the fine given has a reasonable likelihood of being paid. To this has been added a further purpose - that of achieving an equality of impact of the fine on offenders. Whether this second objective was a direct intention of the legislature is a debatable point; arguments can run either way. But what is clear is that amongst the sheriffs interviewed and in wider discussions about the fine, it is seen as a desirable objective and one that sentencers ought to take account of in their decision-making.

This statutory requirement can be seen as a legal recognition of the sociological fact that wealth and income are unequally distributed throughout the population. If the fine is to hurt all offenders equally then it must accommodate this wider social inequality. The rich should not be able to buy their way out of the effects of punishment and the poor ought not to suffer unduly simply because they are poor. As was argued in the last chapter, this legal requirement encourages a radical form of consequentialism. Interpreted literally, it would mean that the size of the fine would vary in direct proportion to the means of each offender.

This conclusion has generally been seen as unacceptable by the legislature and the judiciary alike. The objection to it is that it compromises one idea of the nature of justice. How can one have a fair legal system if different offenders suffer differently for the same offence or crime? The radical adjustment of fines to income, appears to challenge the maxim that all are equal in the eyes of the law.

There are two different notions of equality at work here. One stresses a formal equality which, in legal terms, is generally taken to mean that punishment should reflect the seriousness of the offence. The other, which has variously been called equality or equivalence of impact requires punishment to reflect the situation of each offender. A tension exists between these two notions as they pull in opposite directions. Whichever notion is adopted has grave consequences for the nature of the legal system. If the notion of formal equality before the law is advocated, and sentencing is based on offence related criteria, then one can anticipate, as a result, a legal system in which there is a high degree of consistency. On the other hand, if equality of impact is advocated, then there is no premium on consistency of results in sentencing.

The notion of formal equality is deeply embedded in western legal culture. It is one of the main policy objectives we expect the legal system to achieve. Yet, equality of impact reflects values of a wider, but as estimable, sort. Both notions of equality are instantiated in the law but in different ways. The notion of formal equality is central to legal culture but is not explicitly stated in statutes relating to the fine. It is a general presumption in case

law, but it must be remembered that precedent is not binding in sentencing decisions. In our terms, formal equality is a substantive rule. The notion of equality of impact in contrast can be seen to have explicit statutory statement. It can be perceived as a formal legal rule. Admittedly, the statute does not absolutely require the sentencer to adjust the fine to means - it simply requires him to take them into account - but this intention can be "read" into. Because these two notions of equality pull in different directions, there exists a tension between the two types of rule which encapsulate them.

This tension is acute at the point of decisions on how much to fine an offender. Do sheriffs fine on the basis of offence-related or means-related criteria? The evidence from the interviews describes a complex situation. The general inclination of the sheriffs is to put offence-related criteria first. Their first consideration is the seriousness of the offence; it is part of their general punitive stance. One sheriff put it this way,

"Strict proportionality of the fine to income
would contradict proportionality to offence.

Therefore, there are limits to proportionality; in
effect the offence comes first." (Sh.7)

All but a few sheriffs argued this way. Consideration of income, for most sheriffs, takes a second or third place. The order in which the factors are considered can be described in this way - (1) offence; (2) record of offender; and (3) income and family circumstances. Different sheriffs may substitute between (2) and (3), but nearly all of them placed offence-related criteria first. Those sheriffs who differ do not necessarily place income first. Rather, they claim to

treat all factors simultaneously. Two examples illustrate this point,

"The offender's means are a factor, alongside the offence, record and so on." (Sh.6)

and

"It [the fine] is influenced by: income, record, ability to pay, nature of offence - in no particular order." (Sh.9)

No sheriff placed income related criteria as the first consideration. Seemingly, all sheriffs thus work on a principle of formal equality and then try to accommodate for equality of impact.

However, the position is more complex than this. The actual amount of money fined reflects also what sheriffs call the "going rate". By this, they mean not only the amount of money it is conventional to fine for a particular offence or crime, but also a convention on how much the typical offender that appears before them can reasonably be expected to afford, regardless of the seriousness of the offence. The "going-rate", in this second sense, is not established by reference to the income of particular offenders. Rather, it is set by the general economic climate. For example,

"... the magnitude of the fine is in proportion to the economic climate." (Sh.3)

"The fine is in proportion to generally limited means. It is restricted in a non-affluent society." (Sh.4)

The "going-rate" sets a very real limit on how far the fine can reflect seriousness of offence. To go beyond the "going-rate" could

well end up with the offender defaulting and being imprisoned. As we pointed out above, sheriffs are extremely reluctant to see this happen. This constrains their action considerably. One consequence of it is that offence related criteria in fact operate within a wider appreciation of criteria related to income. These latter criteria do not bear down upon the individual offender but upon the means available to the common mass. Formal equality thus operates within a wider conception of equality of impact. The substantive rule is brought within the ambit of a practical interpretation of the formal legal rule.

In the light of this, do sheriffs adjust the fine to reflect the means of the individual offender? Sheriffs do adjust the fine, but within very narrow limits. Any movement upwards or downwards is limited by the stress on formal equality and by the impact of the general "going-rate". Sheriffs express a reluctance to lower the size of the fine too much as they consider the "going-rate" argues for low fines anyway. Also, to lower the fine for offender X as against offender Y could well contradict the emphasis on formal equality. Hence, adjustment of fines to low income is bounded by substantive and formal legal considerations.

Different sheriffs operate these rules so as to produce different outcomes. Some sheriffs claim that they are more likely to increase fines in proportion to income because the norm is so low that they feel they could go no lower. For example,

"It is more usual to increase the fine in proportion to means than to decrease from the norm because the norm is rooted in low income. The

tariff is based upon unemployment." (Sh.11)

Another sheriff argued a similar case,

"The scope for increasing the fine according to ability to pay is limited because most offenders are poor anyway." (Sh.7)

Sheriff (11) completed the argument by commenting,

"Any increase is not strictly proportionate, more of a gesture."

Other sheriffs observed that they adjust all fines for income, but recognised, at the same time, the limit described above.

There were other considerations mentioned which affect whether the fine is adjusted for income. For example, it appears to be more common to reduce for income in the case of regulatory offences or the less serious of the common law crimes, such as breach of the peace. For more serious crimes, however, the fine is likely to be increased if the sheriff concludes that the offender is able to afford it. By doing this, they emphasise the punitive nature of the sanction.

The actual figure in fine is calculated by a rule of thumb. Sheriffs combine a knowledge of the typical fine given for the offence or crime, with a figure that represents an adjustment to the average net weekly income of the offender. The average net weekly income forms the norm which can be adjusted for offence related criteria or other relevant criteria such as whether the offender is married and if there are children. Information about income is gained by asking the offender or the agent in the court. Sheriffs commented upon the lack of reliable information available to them.

In conclusion, it seems that the criteria used to determine the

size of the fine are centred on income related criteria. Although sheriffs place offence related criteria first, the practical realities of constructing the fine force sheriffs to resort to income related criteria.

The central role monetary considerations play in setting the level of the fine, in conjunction with the prevalence of the fine create considerable practical problems for the sheriff. One sheriff expressed this succinctly. He argued that a penal system which depends upon money will inevitably run into crises when there is less money about. Increasing unemployment means that the average income of the typical offender is continually falling. Either sheriffs lower fines in recognition of this, or they must contemplate sending an increasing number of offenders to prison for default. Their only other alternative is to use the fine less, but this, for reasons explained above, is a limited option. The sheriffs interviewed recognised this, but were not sanguine about the possibilities of solving it. Indeed, in one sense, solution is not within their competence. It is a matter for the legislature. But as one sheriff said, the legislature appears not to be interested in fines.

Setting Instalments: The Realisation of Consequences

With the exception of very special circumstances, all offenders must be given time to pay their fines. The sheriff also has the option of allowing payment of the fine by instalments. Either the offender requests this facility or the sheriff can offer it. Instalment payments are now a very common way of administering the fine, not least because this helps to minimise the possibility of

default. However, sheriffs are ambivalent about instalments. Some argue that instalments change the nature of the fine. Either they lower the fine's punitive impact or they transmute the fine into a far more serious punishment than it was intended to be by extending it over time. There is a further dimension to the problem. All sheriffs are conscious that instalments make income related criteria central to the fining process. This further threatens the importance of offence related criteria. A concern with money appears to displace a proper emphasis on punishment.

The majority of sheriffs accept the idea that payment by instalments is a necessary feature of the fine. They appear to resent it, however, sensing the passing of a definite "price" paid and they also regret the development of, as one sheriff put it, a "sin now pay later" society, or "crime on the H.P." (Sh.4). But they invariably accept it as the only practical way in which offenders can pay their fines. The following comment is illuminating:

"I have no objection to instalments but their use does alter the nature of the fine. For example, it used to be the case that one 'paid up or else' but now it is seen as an 'extended hire purchase penalty'." (Sh.2)

Sheriffs respond to this perception of the effect instalments have on the fine in a number of ways.

There are those who see it as offering a positive opportunity to impress monetary discipline upon offenders.

"Instalments do have a positive advantage because they remind the offender each week of his

punishment." (Sh.2)

The constant reminder and persistent bother of regular payments is seen to serve a purpose: it extends the control of the court over an offender's lifestyle.

"Bother is the key to the fine, longevity of instalments is the punishment ... two to three years is no problem." (Sh.6)

and

"Instalments can be a positive advantage, because of the reminder element." (Sh.8)

It consistently limits the standard of living and ensures that a sacrifice must be made. This achieves the punitive purposes sheriffs hold to and also "disciplines" offenders by influencing how they manage their budget.

It is these purported "benefits" of instalments which lead other sheriffs to question their use. They argue that the extended control over an offender's lifestyle is unwarranted for a number of reasons. For example, sheriffs see it as a good jurisprudential principle that punishment should have an end rather than to protract indefinitely.

"Law implies that proceedings should not go on for too long. Decision-making and the disposal should be decisive, too long is too onerous." (Sh.1)

and

"The fine should have the possibility of being paid in a reasonable time, if not then either lower the fine or incarcerate in the first place."
(Sh.?)

Similarly, these sheriffs worry that the regular payment of instalments, by becoming routine, tends to dilute the original sanction. By splitting it into a number of easy payments, instalments appear to contradict the punitive aspect of the fine. As one sheriff put it: "the purpose of the fine is not to take their money away gradually, the aim is to pay the fine. Otherwise imprisonment is more suitable" (Sh.8). This is seen as inconsistent both with the "voluntary" element inherent in the fine and also with the idea that the fine ought to hurt. In order to limit this, most sheriffs have a definite period in mind over which repayment is allowed. Typically, the maximum is set at one year.

There are other sheriffs who do not feel so constrained and may allow payment over a longer period, even up to three years. These sheriffs are in a minority and tend to be those who argue for the disciplinary "benefits" of instalments.

There is another general worry sheriffs have about instalments. This concerns the persistent offender who collects fines on a regular basis. The use of long periods of repayment is said to create a situation whereby fines tend to run into each other. Some offenders end up paying many fines over long periods, or more realistically, are incarcerated for default. For the majority of sheriffs this justified the maximum instalment period of one year; as one commented,

"There has to be an end, not least because there is a problem with fines running into each other because offenders go on accumulating fines."

(Sh.9)

The general worries sheriffs express about instalments are

reflected also in the process by which they actually set the rate of repayment. It is here that the tension between offence related and income related criteria reappears. The problem sheriffs face is to set a rate of repayment which is realistically related to income without this either "softening" or increasing the punitive nature of the fine. They manipulate the situation in a variety of ways.

Sheriffs may set a relatively "low" fine but impose quite severe conditions on instalment payments. In doing this they can adjust the fine to income, yet still make it "hurt" the offender. Each instalment is set so as to maximise its impact on the offender, but as the overall fine is relatively low, there is little chance that default will occur. If it should arise, the instalments can be eased. Sheriffs who manipulate in this way, tend to believe that the "real" punitive effect of fines lies in the weekly instalment rather than the aggregate amount. For example, "the use of instalments can increase the magnitude of the fine" (Sh.3), and "the instalment should hurt, especially if the offence is serious" (Sh.7).

Typically these sheriffs are keen to see that fines are paid sooner rather than later. They tend thus to set both high instalments and limited time to pay. The one year maximum is never exceeded and is really only used for those who default.

By setting a relatively low fine but imposing strict conditions on repayment these sheriffs see themselves as combining offence related and income related criteria. The low fine reflects income, and the limited repayment period and high instalments reflect offence criteria. This allows them to stress the punitive nature of the fine. Also the financial discipline imposed on the offender, if he meets its

conditions, is seen to reassert the voluntary element sheriffs see as important in fining. This combination of variables is seen to force offenders to recognise their obligations by paying a proper price for the harm they have done.

Other sheriffs pursue these same broad ends by reversing the order. They set a high initial fine and then adjust it to income via instalments. One sheriff explained it this way,

"The aggregate amount of the fine must have some dramatic impact because weekly instalment must be affordable and, therefore, reasonably easy to pay off." (Sh.6)

They see this as marrying both sets of criteria. The size of the fine reflects offence criteria, while instalments reflect income criteria. These sheriffs are more likely also to extend the period of repayment and to welcome the disciplinary effects of instalments. This leads them also into approving, as their other colleagues tend not to, the introduction of fine enforcement officers. For example, "fine enforcement offices are approved because they remind, irritate and bother offenders" (Sh.13).

There is another aspect to setting instalments which is of considerable sociological importance. Both sets of sheriffs, but especially the second, engage in a form of negotiation with offenders in the court over the size of the instalment. If income is relevant to the instalment then some information about means must be gained. Sheriffs gain it by asking the offender on the spot. This is followed by a short negotiation between the sheriff and the offender over the actual size of the instalment.

The negotiation takes two forms. In one, the sheriff ascertains weekly means and then sets both a time limit for repayment and the size of the instalment. The offender responds by saying he cannot afford the instalment and the time period for repayment is too short. The sheriff may in turn respond by asking the offender how much can be afforded. The offender replies and then the sheriff may lower the instalment, or extend the time period. In the other, the reverse happens. The sheriff asks the offender how much can be afforded and the offender responds - for example £2 per week. The sheriff then if it is thought the offender can afford more, sets the instalment at, say, £3 or £4 per week.

Sheriffs, if they entertain this at all, seem predisposed to lower instalments more readily in statutory offences and for the young or the "feckless" offender. If the offender is employed and has few or limited commitments, then the negotiation probably will not take place at all. For this latter group of offenders, adjustments are more likely to be made only if default occurs.

This negotiation is extremely one-sided. Sheriffs are not obliged to listen at all. However, when it does occur, and it is quite common, then it is of considerable interest. It differentiates the fine from other sanctions. One cannot imagine such negotiations taking place over a sentence of imprisonment. A sentence of imprisonment has an all or nothing quality about it. Offenders cannot say that they cannot "afford" to go to prison for six months but would prefer three.

This process of negotiation is unique to the fine. Again, it is an example of the extreme flexibility of the fine as a sanction.

Also, it is quite consistent with the original meaning of the term. It will be remembered that historically the meaning of the term "to fine" did not imply a fixed punishment. Rather, one "made fine" with the court or the king. The fine thus represented a negotiated agreement terminating a dispute. That these negotiations still take place, albeit in a much more restricted way, is evidence of the continued existence of the fine as "a bi-lateral agreement" (Pollock and Maitland, 1898).

The Fine and Compensation

The introduction of the compensation order into sentencing has attracted some opposition. This can be seen in several sorts of objections. The first asserts that sheriffs ought not to get involved in judging between the competing claims of victim and offender because this is seen to contradict one of the basic functions of the criminal law. It introduces "civil" elements into the criminal justice system. As one put it, "there is a general reluctance to graft a civil action for damages onto a criminal trial" (Sh.11). The second objection highlights practical problems. Assessing damages between offenders and victims involves the issues of contributory negligence and insurance. These are complex and time consuming questions that sheriffs fear will delay the business of the court. One sheriff for example was "... reluctant to use compensation orders too freely because of the complexities of calculation and the time involved" (Sh.6). Another regarded it "... as a complication. ... Is it applicable? What is the appropriate figure? Is it commensurate with an appropriate fine? What part of the penalty should be given to

compensate the victim?" (Sh.10). Again, there was little agreement over what sort of situation is suitable for compensation. Some sheriffs viewed compensation as eminently suitable for offences involving property, while others see this as entirely inappropriate. While in property offences there is something which can be measured and compensation ordered accordingly, the goods may well be covered by insurance. If this is so, sheriffs were worried lest it be the case that the victim should benefit twice over. Some sheriffs suggested that one way to solve this was to make compensation orders to the insurance company as well as the victim. There was little agreement over whether such orders should apply to personal injury, chiefly because of the difficulty of fixing upon an appropriate figure. Moreover, some sheriffs argued that the figures ought to be secondary to the atonement or humility that is induced by offenders knowing their victims.

"Compensation is valuable to the victim and the offender. The latter benefits from 'atonement' and realises the consequences of his anti-social behaviour." (Sh.10)

"The fact of compensation is much more important than the amount involved which, although a token, is not derisory." (Sh.11)

"Compensation is more relevant where there is a pre-existing personal relationship between the offender and the victim, especially where personal

injury is involved." (Sh.6)

Sheriffs raised a further related question about the nature of the compensation order. Is it, as many sheriffs argued, the fine paid to the victim or is it a completely different sort of sanction? Is it "... different from the fine because of the involvement of the victim?" (sh.8). Sheriffs did not state conclusive positions on this question.

The compensation order was seen by many sheriffs to be an unnecessary complication. It clouds the issue, precisely because the boundaries between it and the fine are unclear. Involving the victim in the system was seen to have some advantages, but these appear to be outweighed in the minds of the sheriffs by the disadvantages ensuing from its ambiguity.

Default

We have discussed the relationship between the fine and imprisonment and the way in which different sheriffs regarded them. There is one stage in the "fine process", however, at which the two are naturally joined. This concerns the problem of default and the use of prison as a sanction for it. So far as the sheriffs are concerned, prison is a "compulsitor" of the fine, a "final solution" (Sh.4). It is seen as a necessary back up to the effective use and collection of fines. Most sheriffs argue that the "prison is necessary". Sheriffs may administer the default process differently, but there is consensus over the value of prison. A rather two edged cry by one sheriff illustrates this well:

"Fine defaulters only go to prison because there

is no alternative." (Sh.7)

More pointedly,

"There is no alternative to prison as a last resort." (Sh.9)

Although one sheriff sees it rather differently:

"The fine may well shade into imprisonment upon default, but this is unnecessary. Default is a result of the offender's deceit or the sheriff's miscalculation." (Sh.3)

The threat of imprisonment is seen to make offenders generate resources which otherwise they would claim they do not have; the threat of imprisonment makes the offender pay. It is true that "community service" would be welcomed by some sheriffs, but only in the sense of introducing an alternative with prison still as the ultimate sanction. The use of community service in this way is seen as justified, first of all, on the grounds that it represents payment though time or labour rather than money and, second, because it is used as an alternative to imprisonment, but its use for default is not welcomed.

"Community service does not provide an equivalent alternative to a monetary fine because valuable services are skilled services, otherwise they are of no use." (Sh.5)

As always, there are different opinions, one which points out that the logic of imposing a fine is that it should be paid. Therefore, anything which achieves this should be encouraged.

"There must be other ways of enforcing the fine

than imprisonment, for example, a graduation of penalties ... the link between the fine and imprisonment is completely unnatural." (Sh.12)

This view is offset by those - and this represents the most common view - who believe that fine default is a matter of unwillingness rather than inability to pay. One sheriff even distinguished between "the wicked, on the one hand, and the feckless and women, on the other. The latter should not be imprisoned unless absolutely necessary" (Sh.3).

For most sheriffs there is a necessary unbreakable relationship between the fine, default and imprisonment. As one sheriff put it,

"There is a sanctity in the relationship between prison and the fine." (Sh.11)

There is another aspect of the default procedure which sheriffs see as important. Although sheriffs said they found means enquiry courts "distasteful" they were adamant that they should retain control over the process. The issue this raises for them is the scope of their discretionary power. Any attempt to take away their control of this process was seen to be a major intrusion. By controlling default procedure, sheriffs maximise their discretionary powers over the whole of the fining process. Default is another chance to adjust the fine. Control over it allows them a further opportunity to create a balance between offence related and income related criteria; another chance to marry substantive and formal legal rules.

Sheriffs were reluctant to lower the size of the fine in the means enquiry court. They prefer to work on instalments by lowering them or increasing the period of repayment or both. Furthermore, this

wish to retain control over the default procedure, colours sheriffs' views on the advantages of fine reinforcement officers. If their introduction results in a challenge to their powers, then sheriffs would prefer not to see them at all. Fine enforcement officers were a move "to social worker control". The main benefit of the officers would be to supply better information on means. This would allow the fine to be more realistically adjusted and would enable the sheriff to better "rationalise" decisions already made (Sh.4).

Discussion and analysis

In this last section, I propose to draw out the implications of the arguments developed over these last two chapters and to integrate them with the broader themes of the inquiry. The discussion is organised under two heads; first, punishment, justice and money; second, rationality and the normative practice of sentencing.

Punishment, justice and money

The analysis of the sheriff interviews provides abundant evidence in support of a claim made earlier - that the primary end sought after by sheriffs in sentencing is the achievement of justice through the use of punishments. This may seem an obvious or even idle comment to make, but it has great import. It shows that sheriffs perceive sentencing to be above all else a moral issue. While they have to come to terms with the formal legal requirements of their office and of the sanctions they impose, they seek after a wider, substantive end, justice. For them a "just" system is one which endeavours to balance the illegal wrongs done by criminals by an equivalent but

legitimate wrong inflicted on the guilty party. Justice and punishment are closely connected; the one is the end to the achievement of the other.

The place of the fine in this is central. It is the sanction they regard as most easily justifiable in most circumstances in terms of their classical views of the nature of punishment and also the one most flexible and administratively useful. Partly because of the type of offender and offence that appears before them, partly because of the constraints placed on them by convention and statute, other sanctions lack conceptual and ideological purity. They are "contaminated" by values (such as treatment) which compromise their use with the result that they cannot carry the message of punishment the sheriffs wish most to convey. Using the fine on the other hand can carry this message. It allows them to achieve their desired ends with integrity, and coherence.

The fine is the most used sanction because it exists at that point at which ideology converges with administration. Sheriffs approach sentencing in the normal way described, but at the same time their actions are limited and constrained. They are charged with a dual mandate; achieve justice but do so in the most expedient fashion possible. In the vast majority of cases they deal with, the fine is the only sanction it is practically possible to use. The great bulk of their criminal work is to do with the trivial and the routine and to use any sanction other than the fine is either ruled out by statute or existing practice. In the more serious, but still relatively minor crimes they have a discretion to use other sanctions, but to do so can be both troublesome, as it prolongs the process and so slows down the

system, and also brings them into contact with a set of values about which, at best, they are ambivalent. The use of the fine in such circumstances meshes the moral message with the administrative reality. Punishment is achieved but at some cost.

One of the costs the sheriffs recognise is that the use of the fine results in a penal system which in many ways is not as punitive as they would like. They perceive the fine as a punishment, but a "light" one. If the use of imprisonment did not give rise to the administrative and conceptual complications that it is seen to, then one was left with the impression, in many circumstances, that it would have been preferred. Conceiving of the fine as a punishment is not inconsistent with a perception of the prison as a more serious one. Their "argument" is not with the scale of values by which seriousness is measured, but with the constraints placed on their actions by the factors we have mentioned. If these factors were to be removed - for example, if the sheriffs were High Court judges dealing with serious crimes - then I was left with little doubt that they would use the prison. However, they are not in that position and their views on what it is practically possible to do alter accordingly. That this results in a penal system less punitive than one they would ideally like is a "cost" they have to bear.

There is another cost arising from the use of the fine with which they have to live. This is the potentially corrosive effect the fine can have on achieving equality in punishment. As we observed, the need to take into account the means of the offender in setting the level of the fine causes a dramatic shift in favour of offender-related criteria at the expense of offence-related ones. This is a problem

for the sheriffs because, as was explained, their basic inclination is to set the level of the fine by offence-related criteria - the seriousness of the offence should in principle determine the seriousness of the punishment. They hold to this because of their underlying retributivism which aims to achieve a proportionality or balance between the offender's ill-gotten gains and the victim's undeserved losses. However, the statutory requirement to take into account offenders' income considerably blunts the realisation of this type of proportionality in order to achieve a second type of proportionality, that is the degree of pain caused by the deprivation of a commodity like money. Proportionality can thus pull in two directions: one towards the achievement of formal equality related to seriousness of crime and the other related to the income characteristics of the offender. In our analysis of the interviews we showed how sheriffs manipulate time to pay and instalment patterns in order to relax the tension that can arise from the desire to achieve the former and the requirement to achieve the latter.

This is a real conflict for the sheriffs even if we adopt a somewhat less onerous view of what statute actually requires sentencers to do. It could be argued, for example as does Black (1987), that statute only requires sentencers to have regard to the ability of the offenders to pay the fine, rather than requiring them to achieve equivalence of impact in the more fundamental sense we have described. The difference between the two is that, according to the first notion sentencers are not called upon to contemplate the justice of their decisions in the broader sense the notion of equality of impact suggests, but more narrowly only in terms of the administrative

problems that can arise if default occurs and this can be seen to be connected with an unrealistically large initial fine. However, even if it is the ability to pay that is sought after rather than equivalence of impact, the same corrosive potential exists.

Adjustment to ability to pay holds the same dangers. Moreover, the two are connected. One of the reasons why it is seen as reasonable to adjust the fine to the offender's ability to pay is precisely because it is seen as iniquitous that the mere possession of money should result in the rich suffering less than the poor. In reality, as we showed earlier, little is done to increase fines in proportion to income, but to suggest that the modern penal system disregards the notion of equivalence of impact altogether, is surely to overstate the case.

However one interprets the burden this requirement to take into account income places upon the sentencer, the tension between the two directions in which proportionality pulls is ever present. As such it marks one of the most dramatic effects of money on the penal system.

One very concrete way this requirement affects the making of decisions can be seen in the relationship that exists between the economic resources of the offender and the "going rate" of fines. There is a relationship between^e the income of the "typical" offender who appears before the court and the constraints this places upon the decision-making of the sheriff. In order to both minimise the possibility of default and for the broader reasons described above, the sheriff will adjust the fine to income. But the only income many of the offenders who appear before the court have will be social security payments of one type or another. Sheriffs were aware that

any fine imposed on such individuals is a major commitment, not only to the individuals concerned but, if they are married, to their families as well. Social security payments are so designed as to leave little disposable income. How do sheriffs act in these circumstances? As was pointed out earlier, sheriffs are more likely to lower fines than raise them, but they see there to be reasons of justice which put limits on the degree to which they can do this. Offender-related criteria cannot be ignored not least because the "going rate" is set by consideration of them. Nevertheless they must and do adjust fines downwards in recognition of the fact that the individual is on social security. The end product of this process is that over a period, the going rate of fines is dragged down. The level of social security payments becomes reflected in the going rate; it has a generally depressing effect.

There are a number of factors which influence this, some of which sheriffs can control, others they cannot. As the number of unemployed increases the more sheriffs have to deal with individuals on social security - as one sheriff put it "how can you run a system which depends on money when there is less money around?" There is less likely to be any significant adjustment for income in the case of motoring offences. The existence of the tacitly recognised "tariff" - for example so much for every five miles the speed limit is exceeded - works against major adjustments to income. And sheriffs are only likely to deal with fixed penalties if for some reason the offender is challenging the decision of the procurator fiscal or the court. Hence, the depressing effect of social security payments on the going rate of fines is most likely to be found in the middle range group of

common law crimes.

This relationship between^e the going rate of fines and social security payments is a good example of how the sense of justice after which sheriffs seek is compromised by money. But it only has this effect because of the existence of a formal legal rule which instructs sheriffs to take monetary consideration into account. At this point the two sorts of rules we have considered come into conflict with one another. There is an acute tension between them.

Although, as has been said, it is in the middling serious common law crimes that the influence of social security payments on the going rate is most felt, there is a broader knock-on effect. The going rate acts as a common denominator no matter what the income of the offender is. Thus even if the guilty offender is employed and "comfortably off", the fine would be lower than the sheriff may think is warranted if the sentence were to depend just on offence-related criteria. Consistency of results in sentencing decisions is a factor in the sheriff's idea of justice.

The reaction of a sheriff in these circumstances is to try and increase the punitiveness of the fine by offering a limited time to pay and demanding larger instalments. They manipulate the facilities of time to pay and instalment payments in order to better realise their sense of justice.

There is another more general dimension to the effect money has upon the mechanisms of decision-making which also has implications for the achievement of justice as it is understood by sheriffs. This centres on the relationships between the nature of the "commodity" the deprivation of which constitutes the punishment and the notion of

formal equality which, as we have seen, forms an important part of the sheriff's notion of justice. My point is that because the fine is paid in money it introduces an element into decision-making that threatens to put in question the degree to which formal equality of sentence between offenders can be achieved. To explain this I shall contrast what I call the "original position" of a sentencer when passing a sentence of imprisonment as compared to the "original position" when passing a sentence of fine.

As was argued in chapter 2, an individual's right to liberty is seen, in modern, liberal democratic societies to be near an absolute as anything can be, subject only to certain important, but minimal, tests such as mental competence. This has a direct bearing on the process of sentencing somebody to imprisonment. The sentencer can presume each individual is in a formally equal position as each, as it were, "possession" the same "quantum" of freedom. The original position thus is one of formal equality of all subjects. Because of the way we regard liberty the sentencer is acting reasonably in making this assumption. Of course, at some later stage, the sentencer may wish to vary the sentences of imprisonments as between two individuals, but this decision will be made on factors that are secondary and extrinsic to the primary original position. For example, the sentencer may regard one individual to be more culpable than another, or there may be specific factors connected with an individual that allow the sentence to be individuated. Hence, although the final product of the decision-making process - the sentence - may vary between two individuals (we presume they have committed the same crime) it began with a presumption of formal

equality.

The original position in sentences to the fine is very different. A sentencer who presumed any two individuals are in a formal equal position as regards that commodity - money - they are about to be deprived of would be considered to be acting unreasonably. It is acknowledged that money is a commodity each of us "possesses" to a varying degree. This, presumably, is one reason why sentencers are instructed to take into account offenders' means when levying the fine. The original position is thus the reverse of that which can be presumed in the use of imprisonment. It is one in which the only way of treating individuals equivalently is to presume they are in an unequal position as regards that the loss of which will be the punishment.

None of this should be seen as saying that the idea of formal equality as a component of justice is absent from the process of fining. The exercise of sentencing is carried out with a framework in which formal equality is a major consideration. What the above shows is, first, that different sanctions have a different relationship to the achievement of justice and, second, that money acts as an "independent" factor that has a potential to corrode.

There is an irony here. As we have shown, sheriffs regard the fine as the sanction, relative to other available ones, which most clearly and easily carries the message of punishment. They see it as the only true punishment they have left. This is related to their general perception of the purpose of the criminal justice system as achieving justice through the use of punishments. However, this sanction has an inherent potential to corrode the very purposes after

which they seek. It drags down the going-rate in the way described; it requires them to reason from a position which collides with their overall general aims. As a result, "punishment, justice and money" can be seen to pull in different directions; to exist in a state of permanent tension.

Rationality and the Normative Practice of Sentencing

The perception of the fine as a punishment is crucial to its place in the penal system. Although, as we have seen, the fine, because it is paid in money and because of the formal legal rule that directs sentencers to adjust fines to the means of offenders, creates tensions that sheriffs endeavour to resolve, it nevertheless functions to maintain a broader harmony between the various levels at which the system operates. At the system's broadest of levels, there exists a deep, culturally rooted estrangement of money from punishment. Money does not fulfil cultural expectation of what punishment is like. This is why in certain symbolically significant crimes there is a resistance to using fines or any other monetary sanction. On these occasions the prison is used because it meets our expectation of what punishment should be symbolically. Yet beneath this, the system uses the fine - it relies upon it to deal with the vast majority of cases that pass through it.

We have endeavoured to show in our analysis of the normative practice of sentencing how the potential conflict between these levels or strata is kept in bounds by the perception of the fine as a punishment. In a sense, the fine is always "second best" in this regard. It is only relative to the practical constraints sheriffs

face in using the prison that the fine emerges to be perceived in the way it is. Hence, there is always a possibility that the harmony of the system can be disturbed and unsettled. Changes in public policy towards certain crimes and offences can call forth adjustments. This, however, happens rarely. Moreover, much of the daily work of the criminal justice and penal systems is anyway largely invisible to the public gaze. Citizens rarely have a detailed knowledge of the mundane workings of the system. Rather, their "knowledge" of crime and punishment rests on these dramatic incidents reported by the media. The "routine pricing of injury" that the fine represents goes on unnoticed and unreported. It is neither dramatic, nor sensational. It is only on rare occasions, such as when fines are used for rape or other serious crimes, and this becomes known, that any potential for disturbance is created. However, for those working within the system, particularly the sheriffs, there exists a continual task of legitimation. Their integrity as legal actors is maintained by them viewing the fine as a punishment, second best though it might be.

From a different point of view, the normative practice of sentencing is a good example of the complex relationship between different expressions of rationality. As was said in the introduction to this chapter, the distinction between forms of rationality is never clear cut and simple. Formal and substantive rationality shade into one another. The precise social context is always important. Crime and punishment always involve substantive reasoning; they are never neutral concepts but signify deeply held values central to the very possibility of social life. But in Weberian terms, modern society is characterised by the progressive spread of disenchantment. The values

we hold most deeply are under constant threat by the growth of emotionless forms of reasoning and institutional organisation. The spiritual and the emotional can be transmuted into the routine. At first sight the widespread use of the fine seems to indicate that this is what has happened in the spheres of crime and punishment. But as we have endeavoured to show in these last two chapters such an analysis is too simple and too plain. The fine exists at that point where the substantive and the formal touch one another. It appeals to both forms of rationality and this can be seen in the reasoning of the sheriffs we have studied.

CHAPTER 7

Default and Discipline

In this chapter we wish to examine the problem posed to the Scottish penal system by those who default on the payment of their fines. In Scotland this has been, and still is, a matter of pressing practical significance. As is well known, a high proportion of the prison reception population in Scotland is composed of fine defaulters; currently this figure runs at approximately 45% (1984) of the reception population and has been steadily growing in the last four decades (approximately, 35% in 1960; 39% in 1970; and 45% in 1984). In comparison to other countries this is an extremely high percentage; in England and Wales the corresponding figure has been below 10% for a considerable period (but is growing) and in the case of Sweden, for example, imprisonment for default is a rare occurrence indeed. Although we need to keep the problem in perspective - 95% of those who are fined in Scotland pay - it cannot be denied that Scotland has a uniquely severe problem with default. Why is this? Why in Scotland does it appear that so many of those who are sent to prison are there, not directly for the crime they committed, but indirectly because they have not paid a sum of money?

This is a controversial issue. Politically, it shows Scotland in a bad light and has laid successive governments open to criticism. For example, the often quoted statistic which describes Scotland as having the highest use of imprisonment in Europe per 100,000 of the population is closely connected with default (Council of Europe 1985). We use the prison so much ~~because~~ we send fine defaulters to jail so

often. For the administrator it must constitute an endemic worry. How can the criminal justice system be run rationally, when there appears to be what must be regarded as an irrationality at its very core? Yet again, for the judiciary it faces them with business which, as we showed in Chapter 4, they consider not to be essentially judicial at all; the court is turned for part of the time into a debt collection agency, this having little to do with the prosecution of crime. And for the offender who for whatever reason does not pay, the prospect of being imprisoned for reasons other than the crime or offence committed appears, as we shall show, an absurdity. To paraphrase one particularly eloquent defaulter (who was interviewed), "what sort of value for money is this?"

Like many controversial issues there is a high degree of uncertainty prevalent in discussions of it. Is the default problem due to a lack of political will to promote legislation making imprisonment for default more difficult? Are the Scots less responsible, in the sense that they do not recognise the obligation to put right wrongs they have committed? Or, are we faced in Scotland with a particularly draconian judiciary who too readily use the prison? And, what practical measures are there available to solve the problem?

In what follows, we shall endeavour to bring greater clarity into the discussion by trying to identify more closely what sort of issue default is. We will do this first by sorting out conceptually where the problem lies and then, secondly, by putting the default problem in an historical and social context. Finally, we will discuss what sort of solution is most likely to be effective.

Who says default is a problem?

The reason why default is considered a problem in Scotland is that so many defaulters are imprisoned, not because a large proportion of those who are fined do not pay. If this is kept firmly in mind, it does alter what sort of problem default is seen to be. First, as has already been pointed out, 95% (approximately) of those fined pay without there having to be recourse to enforcement procedure. This does not necessarily mean that the fine is an "effective" sanction, but that the default problem is one of limited scope. If we pose the problem in the following way, that only 5% of those fined do not pay, rather than there are great numbers of recalcitrant offenders who need to be imprisoned, then the problem is kept in proportion. Could it not be argued, for example, that a 5% failure rate is acceptable in that it shows the fine is "working well"? If, for instance, we were to perceive the fine as simply a way of collecting money rather than as a legally imposed punishment, a 95% success rate would be seen as an achievement. Credit companies would most probably find such a high percentage of voluntary payment more than satisfactory (see B. Doig, C.R.U., 1981, p.44).

If default is viewed in this light, it can be seen that there exists no essential problem with the process of fining itself. Rather, the issue of default ought to be kept separate and in perspective.

There do, however, remain several issues. First, of those who do default, is this because of an unwillingness or an inability to pay? Second, and this is, it is contended, the more important question, why are defaulters imprisoned in Scotland rather than being dealt with in

some other way?

Much time has been devoted to answering the first of these questions. From surveys done, it appears that the defaulter is liable (a) to be unemployed and receiving benefits, (b) to be younger rather than older, and (c) is more likely to have committed a drink related offence than a serious crime. The relationship of these characteristics to default, however, is complex. One cannot conclude that defaulting is causally related to any one of them; rather, they describe a general profile of interacting circumstances. For example, from interviews¹ conducted with a group of imprisoned defaulters, it appears that some simply regard a fine as a part of living life on "the dole". They are unwilling to pay because they see the money received from benefits as being too low to enable them to pay. Others, for example, make different types of rational calculations. If they had a family and were on benefit, then it was seen as being preferable not to pay fines rather than lower further their families standard of living. Prison becomes a preferred option. Others paid for a time - for example, if Christmas was near - but thereafter chose not to pay. Others simply saw fines, as one put it, as "deferred prison sentences" and so could see no reason to try and meet the obligation at all.

Two general conclusions were apparent. First, if the fine was above £50, then the type of calculations offenders make changes. £50 was seen as affordable, if difficult to meet, over £50 was seen as being too large to try and pay. This may seem to the outsider a relatively small sum of money which any "rational" person would pay rather than risk the stigma of imprisonment. However, this clearly

was not the case; some offenders who default chose to go to prison; for them this is the rational option, both in terms of "cost-benefit" and more general evaluative criteria, such as it causing "less bother". Second, and following on, the prospect of imprisonment did not seem to work as a deterrent. The offenders were normally knowledgeable, in that they realised that default could result in imprisonment, but this did not appear to impinge greatly on their consciousness. For many, the discipline imposed by deprivation of liberty for a definite period was seen to be "less painful" than that which can follow from having to pay a large fine over a lengthy period of time. Long instalment periods were perceived as a pervasive interruption of life style. Prison, on the other hand, because it means a total change of circumstance and routine was seen as neither being as pervasive nor as "oppressive".

It is against this background that the debate over unwillingness or inability to pay must be set. Clearly, for the interviewed offenders the two are not antithetical. Rather, inability and unwillingness shade into one another. The relationship between them is mediated by a perception of low income, not in the absolute sense of a complete lack of available money but more in the sense of offenders seeing their resources as putting them in a relatively deprived position. It is because they see their available resources as not allowing them to live on equivalent, not necessarily equal, terms with the better off that they see themselves as deprived, disadvantaged and therefore as unable and unwilling to pay the sum owed in fine. For them, unwillingness and inability are connected with tacitly held ideas of a society characterised by relative

inequality and lack of social justice. How can the relatively poor meet financial obligations that they perceive to be out of proportion to the style of life their limited means allows? These feelings were more pronounced amongst those on benefit - and as these constituted over 90% of the group interviewed - was one of the most notable features of the interviews.

If the offenders themselves do not see inability and unwillingness as opposed, it makes little sense to approach the issue of default in a way which treats them as such. This does have ramifications for the attitudes expressed by some sheriffs. Some sheriffs treat unwillingness and inability as opposed to one another. As we illustrated in Chapter 4, some sheriffs see defaulting offenders as deliberately recalcitrant. The sheriffs view offenders as having enough resources to meet the fine. The two groups, sheriffs and offenders, thus come into both the fining and the default process with antithetical attitudes. What one group sees as reasonable, the other may see in a very different light.

The position is made more complex when it is remembered that the fine is, as we have argued, a voluntary sanction. Save for the limiting cases of the court forcibly removing money from the offender or using civil diligence to compel payment, every fined offender is put into the position where there is a choice. This voluntary element is part of the conceptual and practical structure of the process of fining. Historically, as we have already argued, the voluntary element entered in in the original conception of "making fine", i.e., making a bargain with the court to settle harm done. Today, voluntariness remains as one of the principles upon which the

fine works. Sheriffs see it as important both because it allows the offender to chose to recognise his obligations and it is perceived to underlie the instalment and enforcement procedures. It is also clear, but indirectly, in the sheriffs' conception of the fine as the only "true" punishment they have left. As we explained before, by this, sheriffs seem to mean that the fine is the only sanction available which they do not have to justify in terms of "rehabilitation" or other "social work" type criteria. At base, most sheriffs are retributivists and this is why the voluntary element inherent in fining appeals to them. It meshes with their conception of the individual as a rational agent, capable of responsible action and thus able to accept the punishment imposed.

The voluntariness of the fine therefore complicates the default issue because it reinforces the sheriffs' perception of defaulters as recalcitrant. It is only if the offender can demonstrate specific material reasons for not paying that sheriffs will move away from their perceptions of defaulters as choosing not to pay. This does not mean that sheriffs readily jump at a chance to imprison a defaulter; rather, they are conceptually pushed in this direction. It is part of their conception of the inner morality of law and punishment.

The two primary groups involved in the default process thus face one another with markedly different attitudes about what is "reasonable". On the one hand, for the offenders there appears to be no sharp distinction between unwillingness or inability; these simply do not describe the complexity of attitude and perception. On the other hand, for the sheriff, the offender is in court not simply for defaulting on a certain sum of money, but also because this amounts to

an evasion of responsibility and of respect for the judicial process.

We can now approach the second and more important question. Why is it that so many defaulters in Scotland are imprisoned? We claim this to be the more important question for two reasons. First, it appears to be the case, if the problem is measured by its effect on the prison reception population that the Scots judiciary do use the sanction of imprisonment for default proportionately more than do the judiciary in other jurisdictions. Following on from this and second, it ought to be clearly recognised that imprisonment is neither a necessary response to default nor, if we accept the evidence of the interviewed, imprisoned offenders, does it appear to be a deterrent.

We have advanced evidence which goes some way to explaining why the Scots judiciary use imprisonment for defaulters. As was contended above, the relationship between the voluntary aspects of the fine and the apparent judicial preference for retribution pushes the judiciary in the direction of perceiving default as a serious matter which justifies using a serious penalty like imprisonment. Although this is relevant to an explanation of the use of imprisonment for default, it does not necessarily explain why in Scotland imprisonment is used proportionately more than in other countries for default. Although we have not undertaken a comparative review of judicial attitudes, there is indirect evidence to suggest the judiciary in other jurisdictions are also retributivist. For example, the general scheme of sentencing described by David Thomas in The Principles of Sentencing (1970), leads one to believe that at least appeal court judges in England are retributivists. The primary decision they are described by Thomas as making - setting the tariff - is normally based upon retributivist

principles; they see the tariff as reflecting the seriousness of the harm done. The punishment is calculated to redress the balance by causing an equivalent harm to the offender. Of course, as Thomas states, a secondary decision may be taken on other principles, such as criteria in mitigation or extenuation, and those may modify the primary decision, but such criteria only come into operation within the context set by a retributivist calculation.

Retribution appears to be part of the general legal culture of professionally trained lawyers. For example, the attitudes expressed by FitzJames Stephens in the nineteenth century are, as we pointed out, a rather extreme version of retribution. Furthermore, Packer's important discussion in The Limits of the Criminal Sanction (1968) of Hart's definition of punishment is also good evidence for this argument. Packer contends that to Hart's five characteristics of punishment, there must be added a sixth - that the reason for causing pain to the offender be justified in retributivist terms. At issue here is not whether Packer is correct in wishing to so extend Hart's work. Rather, the point is that for Packer retribution was intimately tied in with prevailing western legal culture; he portrays it as part of the legal tradition and perceives himself as merely making explicit what was implicit in Hart's scheme anyway. Yet again, the re-emergence in America of the just-deserts model can be seen as the most recent invocation of retributivist principles. The idea of just-deserts, briefly, is that the only coherent justification for punishment is to inflict an equivalent degree of pain on the offender as was caused to the victim. Not only is this seen as a better explanation for the offender, but also has the added advantages,

purportedly, of being fairer to the victim and of setting clear limits on the discretion of the judiciary and executive who run the criminal justice system.

If this evidence is accepted then we can see the retributivist principles of the Scots judiciary as a necessary but not sufficient condition of their propensity to use imprisonment for default. The judiciary in other jurisdictions is similarly oriented, yet do not seem proportionately to use imprisonment for defaulters to the same degree. Hence we must seek further for a fuller account of why in Scotland imprisonment is used.

If the problem is examined historically, it can be seen that it is not a recent phenomenon. In the early part of this century, observers of the Scots system were very aware of the serious nature of the default problem. For example, in 1902, the commentator to the judicial statistics argued,

"This point has been dwelt upon at some length, because the non-payment of fines is for some reason an outstanding feature of Scottish Criminal Statistics when compared with those of other countries, and it may not have received that amount of attention which it deserves." (p.11)

The commentator then proceeded to compare the Scottish situation with the Irish and concluded, first that fines "imposed in Scotland are much higher than in Ireland" (p.11) and that this was directly connected with the greater use of imprisonment in Scotland. Finally, the writer contended that if

"... prison expenditure (could) be reduced without

any disadvantage to the moral well-being of the state, it is clear that a general improvement in administration of the law would be effected."

(p.11)

The same theme is related time and again in the commentaries to the statistics. In 1906, a particularly heartfelt outburst was made.

"It will be seen that those sentenced to imprisonment remain at the previous figure of nearly 11,000. It has often been pointed out that the sentences of simple imprisonment give no idea of the numbers received into prison, as they are increased five times their number by the addition of persons sentenced to pay a fine, but who fail to do so, and are on that account imprisoned in lieu." (p.10)

The commentator went on to quote an "American writer", who said,

"There is something essentially unreasonable and absurd in the effort to collect a fine from men and women who have just spent their earnings in a drunken debauch. Such a demand on the morning after arrest is, in the case of many working people, a formal mockery; and the imprisonment which is yearly meted out to tens of thousands of poor people for failure to make such immediate payment is little less than imprisonment for debt under peculiarly exasperating circumstances."

(p.10, Cmnd. 3829)

These quotations show that the use of imprisonment for default is not a new problem but one that has bedevilled the Scots penal system for a considerable period. Also, it is interesting to note the degree of concern, even exasperation, expressed by the observers. It is rare for civil servants to make such bold, public statements which necessarily imply criticism of the judiciary. Indeed, on occasion, the criticism becomes explicit. Although part of the background to default was seen to be the prevalence of drink and drink related offences, the commentators also clearly "blamed" the judiciary. In 1914, it was argued,²

"From the Report of the Judicial Statistics of England it would appear that only 14 per cent of those sentenced to pay a fine go to prison and serve the full sentence in default. This appears to indicate that the fines imposed in Scotland are as a rule excessive and out of proportion to the means of the persons fined. In the year 1912, £48,000 was paid by offenders as fines and forfeited pledges, with most of the offenders belonging to a class little able to afford such an expenditure. The commissioners continue to believe that were greater care taken to assess fines which would bring them within the reach of offenders, the number going to prison in default would be greatly reduced ... and the sentence which presumably was intended for one of fine would be more generally carried out." (p.10 Cmnd.

7164)

At the time these statements were made approximately 50% of those fined defaulted and were imprisoned. Of course, there has been a very great improvement on this and now, as we have established, about 95% pay their fines. However, what is clear from the above is that there appears to be a much more severe attitude in Scotland towards default than elsewhere. This "culture of severity" is embedded in the Scots system and forms the context within which the Scots judiciary operate.

Further evidence for the existence of this culture of severity can be found in the differential development of legislation facilitating time to pay and instalment payments for fines as between England and Scotland. The Scots legislated for instalment payments before the English. The possibility of payment on instalments was introduced first in Scotland in the 1879 Summary Procedure (Scotland) Act, and time to pay, as a separate facility, was confirmed in the 1881 Act. However, instalment payments were cancelled by the major 1908 Summary Jurisdiction Act. Renton and Brown, in the first edition of their book, ⁽¹⁹⁰⁹⁾ comment that the facility to pay on instalment "was not repeated" in 1908 because it was found "to be inconvenient". Rather, only time to pay was repeated in the Act and Renton and Brown continue their commentary by arguing that nothing precludes offenders making private arrangements to borrow money to pay their fine.

In England, legislation developed differently. Although the problem of imprisonment for default was not as serious as in Scotland, the 1914 Criminal Justice Act did introduce instalment payments. Parts of this Act applied to Scotland but the provision regarding instalments was expressly confined only to England. Thus in the case

of summary procedure, instalment payments for fines were not reintroduced into Scotland until 1938 and for cases taken on indictment not until 1948.

These different patterns of development are important and interesting. Clearly, there existed a resistance to easing the way in which fines could be paid in Scotland. It is suggested that this is connected with the much more prominent role legally trained, professional judges occupy in the Scots system. The sheriff court is staffed by professional judges who are trained in and exposed to the full canopy of legal tradition and culture. This is not the case in England, where the magistrates' court is staffed by lay personnel. In a special sense, the Scots criminal justice system is more "legalist" than the English one.

This structural difference underpins the culture of severity and has the consequences for the wider penal system that we have discussed. Because the culture of severity prevades the Scots system, offenders who default are much more likely to be imprisoned. Default is, as we have said, considered a serious matter in Scotland. Nevertheless, as compared to the early years of this century, there has been a marked improvement. Proportionately fewer people are now imprisoned for default than then were. But the issue remains a problem; indeed, there are grounds for predicting that the increase in the proportion of defaulters in the prison reception population will continue.

We complete this section of the Chapter by reiterating the need to keep the problem of default in perspective. First, there appears to be in principle no weakness with the fining system itself. As we

showed in Chapter 6, sheriffs do, albeit sometimes a little unwillingly, adjust fines, as they must, to the means of the offender. Second, a very small proportion of offenders who are fined default; as we pointed out earlier, if the fine is considered only as a means of collecting cash owed, then it is remarkably efficient. Third, "the problem of default" is not just the number who do not pay but the "disproportionate" use of imprisonment in enforcement. This is to be explained not by portraying the Scots judiciary in a draconian way. Rather, the culture of severity, as we call it, is part of what we previously described as the "normative practice of sentencing". As we argued in Chapters 5 and 6, this is a rule governed process; sentencers must follow the rules of the system if they are to be seen as legitimately fulfilling their role as "judges". The culture of severity could only be altered by intervening in this wider normative practice and as we shall argue this is a politically controversial thing to do.

There is one final comment to make. If it is accepted that the fine is voluntary then we ought to expect default to occur. It would only be by transforming the nature of the fining process into a directly coercive one that the possibility of default could be ruled out. However, to do this would be to change the very nature of monetary sanctions. It would not be an incremental, but a revolutionary change. This ought to warn us to keep the default problem in perspective. If people are given a choice then one must accept that some will always exercise it in a way found to be unacceptable. Default is seen as a problem, in part, because of the tendency to see punishment as coercive. But the clash between our

expectation of what punishment is and the principles upon which the most common sanction, the fine, works serves to show how complex the penal system is. As we argued in Chapter 1, the fine questions our conception of the nature of punishment; it raises ambiguities and questions that force us to think again about how we conceive of the penal system.

Solutions

Typically three different sorts of suggestions are made about how to improve upon the problem of default. The first is to find a better mechanism by which to adjust fines to offenders means. Secondly, attempts have ben made to improve the enforcement process - such as the introduction in Scotland of fine enforcement officers. Thirdly, it is often proposed that a day fine system such as operates in Sweden and other continental countries should be introduced into Scotland. What light does our analysis of default throw upon these? (In our discussion we shall not pay much attention to the second proposal both because this has been explored more than adequately elsewhere by Ann Millar (1985) and also because, for reasons that ought to be clear, we see it as less likely to have a marked effect on the system.)

The third proposal, the introduction of a day fine system, is the most radical and comprehensive. It combines the first suggestion with the far more radical idea of introducing fetters upon the discretion of the judge. It fetters judicial discretion by separating the process of fining into two parts. First, in the day-fine a decision is made about the number of units of fine a particular offence warrants. In making this decision the judiciary exercise the full

discretion allowed them by law. Second, a decision is made about the monetary value of each unit and this is calculated according to the means of the offender. Thus offenders X and Y, X being much richer than Y, could end up with the same number of units of day fine for the same offence but actually pay very different sums of money. Because Y has ten times less daily disposable income than X, then, within certain statutory minima and maxima, Y will pay ten times less than X in fine. This fetters judicial discretion somewhat because the calculation of money equivalence is made, normally, according to a formula which the judge cannot vary. The day fine thus divides the process into judicial and "executive" spheres.

Great claims have been made for the efficacy of the day fine system and certainly in the case of Sweden, it seems to have made a major impact on imprisonment for default. However, one must be cautious in interpreting these claims. It appears that in Sweden no record of imprisonment is made if the offender spends less than five days in prison. If this were to be replicated in Scotland then, of course, it would create a considerably more satisfactory picture.

Nevertheless, the introduction of the day fine system into Scotland is seen by many as advantageous. By fine tuning the money paid in fines to the offenders' means it could well reduce dramatically the number of offenders who default. The use of a pre-set formula that is easy to administer (as the day fine system appears to be) would control the judicial use of power in setting the actual monetary value of the fine but allow them to exercise their discretion over setting the the level of the fine. Thus offence related criteria could be satisfied but this not mean that disproportionately large

fines be set.

There are several traditional objections to the day fine. It has been argued that the day fine could not be introduced into Scotland because (a) we lack a codified system of criminal law, and (b) we do not possess the means necessary adequately to confirm offenders income. The second of these objections is the weaker. From interviewing members of the Swedish judiciary, it appears that they confirm offenders' income in the same way as do sheriffs. They ask offenders in Court what their income is, and unless there are reasons to disbelieve what is said, accept it as a fair account. It is true that in Sweden there exist central records of income upon which the court can draw, but it seems that resort to them is made only when there exists doubt over the veracity of the verbal statement of income provided by the offender. Certainly the impression given by the Swedish judges spoken to was that the on-the-spot confirmation of offenders' income is a perfectly reasonable way to proceed. Scots courts do not have the access to the computerised records of income the Swedish courts do, but it would be wrong to exaggerate the problems that flow from this. It is difficult to see why this should stand in the way of introducing a day fine system in Scotland.

The first objection does have more substance to it but again its force tends to be overstated. The point of the objection is that the equality of impact sought after by the day fine can be compromised unless there exists clear criteria provided by a codified criminal law guiding the number of units of day fine to be awarded for particular crimes. For example, if judge A awards five units of day fine to offender C for a crime, but judge B awards ten to offender D, then

even though each unit will be adjusted to the two offenders' income, offender D will end up paying more in total and so equality of impact will be lost. There are two views on the problem that this creates. The first contends that the day fine system must work mechanically if it is to achieve its ends; judicial discretion must be limited at both stages of the decision-making process. The other view states the opposite; if this is how the day fine system works then it is objectionable^b precisely because it robs the judiciary of the discretion necessary to the operation of a sophisticated legal system. Either way, in as much as we do not have a codified system of criminal law, and, given that traditionally great discretion has been constitutionally vested in the judiciary, the day fine system could not, it is argued, take root here.

The system does not work in Sweden in an entirely rigid way. Judges do have the discretion to vary the number of day fines awarded for particular crimes as this is seen to be essential to achieving just and fair administration of the criminal law. Although equality of impact is seen as a desirable objective it has to be counterbalanced by other desirable ends such as the recognition of degrees of culpability and mitigating and extenuating circumstances. It is thus an exaggeration to portray the day fine as so rigid and inflexible as to place severe limits on judicial discretion.

There exists a tendency, it is contended, to overstress the distinctiveness of the day fine. The way in which the fine operates in Scotland is not qualitatively different. For example, the statutory requirement to take into account offenders' income when assessing the level of the fine does push the Scots system some way

down the same road. This statutory requirement is aimed at the same goal as the day fine - the achievement of equality of impact. Also, judicial discretion has been limited in Scotland. We have discussed the process of rationalisation that has taken place in the Scots criminal justice system. While this process has resulted in the professionalisation of the judiciary it has also placed limits on the "arbitrary power" once seen to be possessed by them. Indeed, one of the worries commonly expressed by the sheriffs we interviewed was that their discretion was continually being eroded by the civil servants in Edinburgh. For example, several sheriffs were very cautious about being interviewed as it was funded by the Scottish Home and Health Department. It was only when they learned I approached the matter as sociologists that they became convinced the project was relatively harmless.

Although there exist differences between the way in which the fine operates in Scotland and the day fine system of Sweden, these are of degree not kind. The day fine thus is better understood as a "finely-tuned" example of a monetary sanction than as being completely different. Undoubtedly it does achieve greater equality of impact because of the limits placed upon the discretion of the judiciary in setting the actual amount of money fined. If this is seen as the desired objective - and, as Sheriff Black's recent paper demonstrates, (1987) there does not exist consensus on this - then the day fine is to be recommended.

We should, however, be cautious in assessing its likely impact on the rate of imprisonment for default. The day fine may cut down the numbers of offenders who default, but it can have no direct effect on

whether the judiciary send defaulters to prison. All the day fine does is closely to adjust the fine to income; it is not directly involved in dealing with default. Hence, the day fine could be introduced into Scotland and there still exist a relatively high rate of imprisonment for default. While the introduction of the day fine may affect the culture of severity by influencing the level at which fines are set, it would not influence it at the stage of default. The day fine is not an enforcement procedure; it was not designed as such.³

How then are we to explain the low level of imprisonment for default in Sweden as compared to Scotland? Clearly, the day fine is involved but only to a limited extent. By better adjusting fines to income, it may well lessen the risk of default, but beyond this its influence cannot spread. Rather, in Sweden what appears to be of more relevance is the lack of an equivalent culture of severity; also Sweden is a much richer country. The Swedish judiciary do not seem to take as serious a view of default as do the Scots. It must be admitted we have only limited evidence directly to support this proposition. It was pointed out to the researcher, for example, that it is quite common to remit fines in Sweden; it was argued that the contact an offender has with the court both at the stage of prosecution and then at the stage of default is sometimes seen as a "punishment" enough. This was seen to be the case especially for first offenders. Also, the opinion was expressed that when the sum of money defaulted on is small, then it is simply neither financially nor administratively worthwhile to pursue the offender to the bitter end of imprisonment. When the situation in Scotland was described to

them, the Swedish judiciary expressed surprise; to them it was clearly an irrational situation. "Why", one asked, "bother with small fines?" The Swedish judges could not see why their lenient attitude necessarily led to disrespect for the court or the criminal law. Indeed, it was forcibly contended that to pursue to the bitter end of imprisonment those who had defaulted on small fines was more liable to create disrespect because it is absurd.

It is emphasised that while this is "impressionistic" evidence it is nevertheless valuable in highlighting what appears to be the problem in Scotland. As we argued earlier, default is a problem not just because people do not pay their fines, but also because the Scots judiciary use imprisonment for default "disproportionately". It is the culture of severity that stands as much as an obstacle to further improvement as does any other factor.

It is, of course, possible to attempt to change this culture. One way would be to set severe limits on the discretion of the judiciary by promoting legislation that laid down very restrictive conditions in which imprisonment for defaulters could be used. Indeed, this has already happened to some extent. The provision to give time to pay instalments, to take in offenders' means, as well as changes in the enforcement process over time, such as the creation of the means enquiry court, the requirement to place young offenders on a fine supervision order before imprisonment and so on, are all examples of previous legislative activity that has resulted in limits being placed on judicial discretion. Further legislation, however, may encounter problems. First, it would meet with, it is suggested, resistance from the judiciary. As we pointed out in Chapter 6 and

above, the judiciary already see there existing quite severe limits on the exercise of their powers. Such resistance by itself need not, of course, be final, but it would be a factor that could militate against successful legislation. Moreover, although fines and default are rarely seen as controversial political issues, attempts to legislate against the wishes of the judges very often are. As a collective, the judiciary are a powerful political group; indeed lawyers as a whole run one of the most powerful closed shops in Britain and possess many ways of influencing government (very often by becoming M.P.s). What any government would have to weigh is the advantages that could follow from dealing with the problem of default (such as no longer possessing the highest rate of imprisonment in Europe) against the disadvantages that could arise from possibly alienating the judiciary.

There is a second broad factor which may limit the desire to do more to deal with default. Rusche and Kirchheimer (1938) argue that the state is slow to deal with default because to do so can change one of the advantages of the fine from the state's point of view. According to Rusche and Kirchheimer, one of the reasons why states generally favour monetary sanctions is that it relieves government of the responsibility to deal with the offender while undergoing punishment. As contrasted to the prison, the fine "privatises" punishment; once fined the government has no more to do with the offender unless default occurs. This offsets the fiscal cost of the penal system. However, if the state has to accept responsibility for the defaulter the financial advantages of fining are decreased. Hence, they argue, governments only endeavour to reform the system on those occasions either when political embarrassment becomes too great

to bear or when the cost arising from imprisonment for default, in combination with the revenue lost through defaulted fines, becomes unacceptable financially.

Rusche and Kirchheimer wrote before many of the more recent provisions dealing with default developed. However, the underlying point of their analysis merits further consideration. The argument that the fine saves money - in the sense of offsetting some of the costs of the criminal justice system - is one still made in support of the fine and other monetary penalties. Further, they are correct in suggesting that governments do place fiscal considerations to the fore (quite naturally perhaps) when deliberating over whether to legislate on the penal system (the call for value for money). The more general thrust of their argument also still bears consideration but stands in need of some revision.

It could be argued that the provisions allowing time to pay, instalment payments, together with the fairly strict procedures that must be gone through before imprisonment for default, all show the state is now much more concerned with the social position of the fined offender. In a sense this is true. Indeed, this development is clearest, not in measures designed to offset default, but in the statutory requirement to take into account the means of the offender in assessing the level of the fine. All these provisions do seem to make awareness of the offender's social position an important element in decision-making and therefore mark the "concern" of the state with criminals. These observations do not necessarily constitute a major challenge to Rusche and Kirchheimer's thesis; what they do show is that it is in need of some reworking.

They do not constitute a major challenge because the provisions do not amount to a continuing and major involvement of the state with the day-to-day lives of those fined. Taking into account income, time to pay and instalments may make the fine reflect resources better and so ease payment, but do not operate in a way which necessitates constant supervision directly by the state or its agents. Offenders are "free" in the sense that there is no direct coercion by an agent who controls how offenders should organise their lives.

However, from the point at which default occurs, the potential for supervision increases. The means inquiry court, the inquiry, albeit sometimes very limited, into why the offender has not paid, the possibility of supervision orders for the young offender and the possible involvement of a fines enforcement officer do denote a much greater involvement of the state. But the issue has to be kept in perspective. Rusche and Kirchheimer's general argument appears to hold good for the majority of those fined; the vast majority pay up without direct coercive supervision. For those who do not pay, as in any other form of debt, the situation changes and the degree of coercion heightens. However, even in these circumstances it is too easy to exaggerate the degree of coercion. The means inquiry court can imprison the offender immediately, but if the sheriff readjusts the fine then voluntariness re-enters. Similarly, neither the social worker who administers the supervision order, nor the enforcement officer who inquires into income can forcibly extract money from the offender. These agents report to the court and it is the court which coerces if it so wishes.

Rusche and Kirchheimer's argument therefore does still apply. To

be more precise one aspect of their thesis is relevant - that which describes the way in which the state is, or is not, directly involved in the fine. The other part of their argument concerning the reasons which lie behind non-involvement is, however, a different matter. As was explained, for Rusche and Kirchheimer the lack of state involvement is to be accounted for in fiscal terms; to set up an apparatus to administer the payment of fines would be too costly. This emphasis, on the fiscal motive, stems from Rusche and Kirchheimer's overall argument concerning the economic basis to penal measures and thus is to be expected.

Its strengths and weaknesses as an explanation hinge upon whether one accepts the economic argument put forward. The argument is compelling in as much as it purports to offer clear "material" causes for social behaviour; reducing complex relationships to an underlying "economic" foundation, like a concern with the cheapness of the penal system, certainly has an admirable clarity. It also appears to accord with the Machiavellian motives popularly seen to be part of political behaviour, and anyway, there is a certain *prima facie* credibility in the idea that cost-effectiveness is a cause of political action. However, it is the very simplicity of the argument which is its limitation. Can complex political behaviour be reduced to a singular underlying cause? Is it possible to explain adequately the actions of government, including within this the civil service and bureaucracy, by one particular end - the marginal costs of institutions? To raise these questions is to bring into debate the charge of economic reductionism often made against Rusche and Kirchheimer (Melossi 1977, 1979 and Garland and Young 1983)⁴. This is not the place to enter in

detail into the pros and cons of reductive arguments and the particular variant of it found in Rusche and Kirchheimer's thesis. And, at the end of the day, even if one was to conclude that Rusche and Kirchheimer's reductive thesis is inadequate, it would not mean one had to reject completely the empirical claims made. As we have said, there is every reason to suppose that at some point a concern with the fiscal costs of a particular penal sanction will affect what happens.

Power, Voluntariness, Discipline and the Fine

The issues raised by Rusche and Kirchheimer have a parallel in a more recent debate about the nature of the fine. In an important article, Bottoms (1983) has suggested that the fine is a non-disciplinary sanction. The significance of this claim is best explained by placing Bottoms' argument in a context of the wider discussions and theories that characterise contemporary penology.

In 1978, Michel Foucault's Discipline and Punish was published, translated into English. In this important book, Foucault argued a complex case about the relationship between power and punishment in contemporary society. One of his most influential theses was that punishment, as a mode of power, can be understood as a type of discipline. By discipline, Foucault means the physical surveillance of offenders by an agent in order to instil in them socially acceptable values through the regulation of their behaviour. The disciplines train offenders and "normalise" them. Thus, the general "functions" or purposes of the penal system are portrayed by Foucault as the regulation and control of the population so as to produce a

compliant citizenry.

This idea of the way penal sanctions work has been immensely influential. Discipline and Punish is typically regarded as a master work, which captures the essence of both how the penal system works and how it will develop in the future. Bottoms' article is a major empirical assessment of Foucault's thesis. The central point Bottoms makes is that if we examine the most common of all sanctions, the fine, then we find it does not operate in the way Foucault's description requires as the fine is non-disciplinary. By this he means that no penal agent is actively involved in the supervision, training or control of the offender. Rather, the fined offender is left to pay the sum owed. If this is so, Bottoms asks, how can the Foucauldian account of the penal system as disciplinary be acceptable as a general description?

The contest between Foucault's account of the penal system and Bottoms' objection to it has an obvious relevance to the arguments developed here. First, Bottoms' description of the non-disciplinary nature of the fine is similar to our argument stressing its voluntariness. Second, the questions Bottoms raises about the validity of Foucault's scheme as a general account of penal practice blends with themes developed first in Chapter 1. Here we argued that a study of the fine brings into question the way in which the penal system has been conceived and explained. However, both these broad topics have yet to be fully discussed. We propose to take our arguments further by reviewing in greater depth the debate between Foucault and Bottoms. We begin by considering the issue of power and its relationship to discipline and voluntariness.

Although Foucault emphasises the diffuse nature of power in modern society, he nevertheless perceives social relationships as dependent upon it. Relationships are expressions of power in both its positive (facilitative) and negative (inhibiting) forms. Power is like the Aristotelean "prime mover" or "cause" - it undercuts and creates what is possible. For Foucault, the penal system is an important modality of power, as it has the wider functions of being one of those mechanisms that organise and control the population. Bottoms' argument, which says in effect that power is not of the essence in the most common of all sanctions, the fine, thus can be seen to bite deeply into the Foucauldian scheme.

To be fair both to Foucault and to Bottoms, the aim of the latter is not directly to assess the viability of the former's original work. Rather, his aim is to attack the work of those like Cohen (1979, 1985) and Mathiesen (1983) whom he sees as illegitimately extending Foucault. However, by implication, Bottoms does raise an issue for Foucault. The precise point seems to revolve around how Foucault conceives of the relationship between power and penal sanctions. What Bottoms brings into question is not so much Foucault's description of power in general, but how it is connected to penal practice. Foucault's general analysis of power could be seen as adequate, yet his description of its expression in penal sanctions be wrong or at least partial. If the focus is only upon the prison, then the portrait of the penal system as a disciplinary form of power is acceptable; if, however, the focus widens to include the fine and other monetary sanctions, then it is less so.

This leaves us, as we have noted, with the tantalising suggestion

that Foucault's account of the penal system is partial and importantly one-sided. In one sense its failings can be seen to be a special case of the more general problems already pointed out in Chapter 1 in our discussion of the "prison-centred thesis". Here we pointed out that it is the tendency of much penological literature to take the prison, or more generally deprivation of liberty, as the historically emergent characteristic of punishment. The explanatory agenda is set up with the prison at its centre, and other penal sanctions come to be characterised in its terms. Consequently, penal sanctions come to be perceived as inherently coercive. Indeed, the criminal law itself becomes so conceived. The literature talks of "the power to criminalise" - this standing as shorthand for a series of broader social relationships involving the state, the ruling class and the instrumental use of power. Although Foucault's work is immensely more sophisticated, not least because one can interpret him as in part carrying on the Durkheimian tradition of perceiving punishment as symbolic (for example, the opening description of regicide), it is prone to exaggerate the extent to which power can be used in explanation of penal practice. This is because he too takes the prison and its regimes as the object to be explained. The prison and its associated disciplines are portrayed as the epitome both of contemporary penal practice and of the nature of power in modern society. And, although, as we have seen, Foucault is careful to talk of the positive, facilitative and creative role of power, the overwhelming impression to be gleaned from Discipline and Punish is that penal power is negative; prisons are the "dark side of democracy"; punishment is a "political tactic" or "technique".

Strictly speaking there are three different issues in Foucault's work to keep separate. First, there exists an outline of a general theory of power in which it is conceived as the fundament of social relationships; it is here that Foucault develops his thesis of the positive and negative nature of power. Secondly, there is a more "empirical" thesis of the relationship between power and one of its modalities, punishment, which, in modern society, is symbolised by the prison. Third, there exists a more general thesis about the spread of "discipline" throughout the institutions of contemporary society; the disciplines radiate from the prison to create the "carceral archipelago". At each stage of the argument, Foucault moves from generalities to particulars in an exciting, but unsystematic fashion. Conventional rules of how to use evidence are deliberately effaced in the name of an alternative, non-systematic mode of social analysis. The result is to produce a text which creates a sense of wholeness by implication - modern society, modern punishment are disciplinary. The focus on power is unevenly developed but forms the thread which holds the various stages of the argument together.

It is as a result of this unevenness that Foucault comes to portray the prison and punishment as instruments of power; as tools that are part of a broader strategy whose purpose or function is to regulate the population by disciplinary means of training. It is in this context that Foucault's description of penal power highlights its negative, repressive and coercive side. It is this impression of what Foucault is saying that allows Cohen and Mathiesen to extend his argument into what Bottoms calls the "dispersal of discipline thesis" - the idea that punishment/discipline is being extended in an

increasingly invisible way into the fabric of the community. Like Foucault, both these writers appear to distrust power - to see the use of power as always worrying, illiberal and repressive; the "punitive city" (Cohen, 1979) is a harrowing place to live; traditional freedoms become eroded as power contaminates the capillaries of social life.

It is to this context also that Bottoms argument concerning the non-disciplinary nature of the fine appeals. His argument works by finding an empirical exception to the received version of Foucault manifest in Cohen and Mathiesen and by alluding to more general theoretical questions. These questions, however, are never fully followed through but rather remain implicit. For example, Bottoms never outlines what follows from his description of the non-disciplinary nature of the fine, nor does he really face the issue of why it is non-disciplinary. Rather, his argument rests upon empirical propositions about how the fine happens to be administered. This, of course, is reasonable but limited. Is the non-disciplinary nature of the fine a contingency or is it an inherent feature of this type of monetary sanction? Could a system of fining be introduced which is disciplinary? Also, even if we accept Bottoms' argument, there remains the question of how the fine is related to power.

Demonstrating the non-disciplinary nature of the fine is one thing; analysing its relationship to power is quite another, yet this is the very issue raised by the structure of Bottoms' analysis.

The reason we raise these issues is not simply to castigate Bottoms for leaving unanalysed some questions. Rather, it is to take further the case we have presented. While there is a similarity - a family resemblance - between Bottoms' description of the fine and our

own assertion of its inherent voluntary nature, there exist also clear differences. The import of our thesis is that the fine is non-disciplinary in the Foucauldian sense because of the voluntary element.

When they have been fined, except for the limiting cases we noted earlier, all offenders are placed in a position where they are treated as if they have a choice to pay. This choice may be hedged by various constraints, including lack of money, but these are contingencies and do not alter the conceptual point we are making. Neither the phenomenological perception the offender has of the fine, nor the offender's objective, structural position, removes the voluntary element. Offenders may see, for a variety of different reasons, not just lack of money, that they cannot pay the fine. For example, imagine two hypothetical offenders, X who is on benefit and so sees it as impossible to pay the fine and Y who is fined for an act of conscience that is judged to be criminal, but who will not pay as this would be inconsistent with the original act. While at first sight we would probably say Y has exercised a choice and X realistically has none, this would miss the point of our argument. As far as the legal system is concerned, both in principle have the same freedom to pay. If they do not, severe coercive measures, such as imprisonment may follow. The judiciary may accept both grounds for non-payment as reasonable but still they must approach the issue of default as though both X and Y have made the same choice. If, for example, the judge accepts lack of resources as a better excuse, then X may be dealt with more leniently. But the arguments in mitigation or excuse enter in at a later stage of decision-making. The original decision made by the

judge presumes a choice to pay, not the ability to pay. The offender stands before the court as a full rational agent.

So the voluntary element in the fine is not affected by the perception of the offender. Rather, the voluntariness is a structural principle that governs how the fine works within the criminal justice system. The way in which fines are imposed and administered depends on it; also, as we argued earlier, it underlies the enforcement process. We have elaborated this point, because in claiming that there exists a voluntary element in fining, we are not arguing a metaphysical or philosophical point about human nature or law. Ours is not a Kantian or Hegelian argument about the principles of free will or determinism. It is a sociological point dependent upon how the fine works in the criminal justice system. Others may wish to extend it into a more general argument about free will, but we do not and nor should we be seen as so doing.

The description we have given of fining bears a close resemblance to those commonly given of civil, monetary remedies. MacCormick (1982), for example, has argued that civil remedies are not premised upon coercion but rather upon the presumption that citizens sometimes need to be reminded of their obligations. As he puts it, there exists an obligation of reparation to put right damage done to another individual: citizens always have a choice to recognise this obligation; all that the law does is to remind them of this. It forces "someone to fulfil a duty which it is still open to him to fulfil". (p.229)

MacCormick develops this argument into a broader one in which coercion is seen not as a fundamental attribute of law, either

criminal or civil, but as one of its contingent features. Coercion can be used, is often used, especially in the criminal law, but is not necessary to the concept of law. Hence, according to MacCormick, theories which portray law as a coercive sanction, such as those of Bentham and Kelsen, are wrong. For example, in talking about Bentham, MacCormick argues,

"What is wrong with Bentham's account is not his insistence on the coercive quality of law, but that he misconceives the way in which it is coercive" (1982, p.228)

and more generally,

"... once we have ditched the misleading notion of 'sanction' which we have inherited, we can usefully speculate upon the extent to which positive law is actually sanctioned by rewards and other inducements built into the social structure of state societies, rather than by pains and penalties alone." (1982, p.246)

There are two points of particular relevance in this. First MacCormick's insistence on the contingent nature of coercion converges with the analysis of the criminal justice system and the place of the fine in it developed here. Coercion, repression, are not the defining features of criminal justice. The example of the fine demonstrates and supports this. In many ways fines are like civil remedies; the individual is given the chance to meet the obligation and it is only if there is a failure to do so, that coercion comes in. Admittedly, there are differences between civil remedies and fines; the latter is

the result of a criminal prosecution and the former the consequence of a private action, but there exist also striking resemblances. In both there exists a presumption that the "offender" is obligated and has a choice to pay. The fine thus brings into question the conceptual differences commonly seen to exist between civil and criminal law. Whereas it is often assumed the criminal law is by definition coercive, the civil is seen as not being so. Our analysis of fines challenges this conceptual package.

Second, MacCormick's more general case about the nature of law does resonate at certain points with Foucault's analysis of power, law and punishment. It will be remembered that Foucault describes power as having two sides, the positive and negative. While undoubtedly, for the reasons advanced, it is the negative side that is exploited both by Foucault and his disciples in their analysis of criminal law and punishment, the positive side ought not to be forgotten. The positive nature of power refers to its facilitative, creative role. This can be captured in commonsense terms, in expressions such as "the power of love" or "the power of God", where clearly the implication is that power is beneficent; it is conceived (perhaps wrongly but that is a different point) as creative. MacCormick's rendition of law, as a non-coercive force that facilitates the possibility of individuals recognising ends valued as good or at least worthy of approbation, dovetails with the Foucauldian positive conception of power. In both law rests upon power, but suggests that power ought not be conceived of only as an illiberal, repressive force.

Of course, for the Foucauldian there always exists paradoxes - stings in the tail. Power may be facilitative but it still works to

PAGINATION ERROR

regulate, to produce the obedient, "normalised" productive citizen as a cog in the capitalist machine. For MacCormick, this too may be the case, but the focus is more restricted and the "ends" or "purposes" differently valued. But analytically there is this convergence.

If we follow through this line of analysis then it is possible to extend and refine our conception of the relationship between the exercise of power and the fine. If we concentrate on the positive aspects of power then we can perceive the fine as voluntary yet still, in important ways, disciplinary. This is not necessarily contradictory to our earlier argument. Bottoms' thesis of the non-disciplinary nature of the fine appeals to the negative conception of power. However, can it not be argued that the financial constraints imposed by the fine upon the offender are as much a "discipline" as the physical training of the body by an agent? Of course, the careful way in which Bottoms constructs his argument by quoting Foucault's definition of discipline and then showing clearly that in this strict sense the fine is non-disciplinary, is well taken and accurate. Yet there exists the possibility to argue in Foucauldian terms in the way just suggested. In a capitalist society what better way to discipline than by depriving individuals of that commodity - money - which is a prerequisite for effective citizenship? Moreover, the arrangement whereby the individual is allowed choice about whether to meet the obligation imposed by the punishment, can be seen as quinessentially capitalist. The offender faces the court, as Pashukanis noted, as the rational contracting agent who can "will" his fate. If the choice is to disregard or "contract-out" of the obligation, then unpleasant consequences follow, but this is taken to be the individual's choice.

Hence there is no necessary incompatibility between stressing the voluntary element in fining and arguing for its disciplinary nature.

The form this discipline takes is to require the offender to comply by an act of will with an obligation that is imposed only because some harm has been intentionally committed. This, as much as directly imposed coercion, is an exercise of power and discipline. In a sense, it is a test of virtue. Those who accept the obligation and pay the fine, show by that that they recognise at least a minimal reciprocity. In refusing to meet the obligation, in defaulting on their fine, individuals show a manifest disregard for this minimal reciprocity; they demonstrate they lack virtue and in consequence they open themselves to compulsion and coercion.

That this process works within a context of wider coercion cannot be denied. Offenders are required "to make fine"⁵ and if they do not, then again they may well be coerced by imprisonment. This wider coercive context clearly establishes a relationship between liberty, choice and money. The legal system presumes actors intentionally commit crime that causes some other actor, the victim, to suffer loss and disadvantage. In return, the legal system offers the criminal the possibility of foregoing money and voluntarily accepting the pain it is assumed this will cause. If he "declines" this offer, money - a material resource - is transposed into loss of liberty.

As Simmel (1978) argues, money continually requires actors to calculate upon the relative value of objects they desire. It requires them to estimate how valuable a particular thing is to them. It also puts a definite measure, the cost, on this value. But the individual is free to choose whether or not to bear the cost. If the cost is too

high then the desired object must be given up or the individual accept a lost opportunity. It is because money enforces this continual process of evaluating different courses of action upon individuals that it can be seen as disciplining them. As Simmel puts it in a rather metaphysical way, money causes continual motion. It never accepts repose or stillness; it renders every thing relatively valuable to everything else (1978, Ch.6 section III).

This process of evaluation is of course carried out in a social context where some individuals possess more money than others. While this does not free them from the discipline money imposes on all, it does mean they are better able to withstand the vicissitudes that can arise from not having enough of it. Hence being rich, or at least better off, does mean one can ride the storm more easily. One is better able to indulge a greater range of desires. One has more control over the process of evaluation that money calls upon us all to make.

To transpose this into Foucauldian language, money is a form of power in its own right. It has an "internal logic" that controls those who come into contact with it. The fine, as a legal punishment, brings to the situation its own internal logic as well. The two mesh in a continual process which requires individuals to make choices and evaluate the outcome of their actions. In this sense, it may properly be regarded as a discipline.

As a form of disciplinary power, money operates independently of social class. All individuals, as we have said, are subject to its discipline. Empirically and conceptually, as Reddy (1987) has recently argued, it is wrong to reduce money just to an expression of the

relationship individuals have to the mode of production. While it is true there tend to be clusters of relationships between class position, ownership of property and access to money, there is no reason to see these all in terms of social class itself. Rather the relationship between social class and money is a contingent, not a necessary.

This does not mean that social class is irrelevant. Rusche and Kirchheimer argue, for example, that the fine exemplifies a class based sanction in that it allows the rich to buy their way out of punishment. This access to money places them beyond incrimination. And, as was noted, in the medieval and early modern legal system, payment of money could be used to settle disputes and thereby either forestall prosecution or be seen as an adequate form of penance in its own right. As relevant as these observations are, they do not meet the point made above. Money acts as a form of discipline independent of class because all are subject to the same process of evaluation that it enforces. In consequence, the way the fine fits into the criminal justice system - the emphasis on voluntariness - the presumed freedom of "choice" whether to pay - means all individuals are treated as if they can make the necessary evaluations on the same basis. The facility to adjust fines to income reinforces this assumption. It is a way of acknowledging the relative access individuals have to money on the basis of factors such as social class, but at the same time, "abstracts" them from these relationships. Thus, even in the light of the recognition of material inequalities, all those fined are treated as if they are able to calculate and reason from the same foundation. Once this happens, they become subject to monetary discipline in the

sense described above.

If we return briefly to the interviews with sheriffs it will be remembered they saw one of the "advantages" of the fine to be that it teaches offenders to manage a budget, and this they saw as part of its punitive effect. Also earlier in this chapter we briefly alluded to interviews conducted with imprisoned defaulters, where we recorded the views of some offenders on the effects of the imposition of fines. They saw fines as having a pervasive effect on their lives; they continually were forced to forego that which they wished to do. Indeed, some saw imprisonment for default as preferable to continued payment. Both the views of the sheriffs and those of the offenders are evidence of the disciplinary nature of the fine. They show how money carries its own disciplinary force. Offenders are forced continually to calculate on the relative advantages and disadvantages of their actions past, present and future. They must evaluate which course of action is most desirable to them. Some sheriffs recognise this and use it in the way we described.

This process of disciplining is more than a simple technique of compliance (cf. Bottoms, 1983). It aims not just to produce an ordered population who recognise that the breaking of rules can cause them disadvantages and pain. Rather it requires individuals themselves to make decisions that directly influence the form their own punishment takes. To an extent this is true of any sanction, but the fine does this within a context premised upon voluntariness not coercion and this changes the situation. The final irony is that the fine is the only sanction another individual can "pay" for you. While it is impossible for another to go to prison in your place or

to serve your probation order, it is quite possible for another to pay your fine. But this is your choice. If another pays your fine you presumably stand in debt to them and your future relationship could well be different. This is just another evaluation you have to make.

Conclusion

Our analysis of default has aimed to show the ways in which power is related to the fine. We have argued that the fine is neither directly coercive nor can it be understood just as an instrument of class. Rather, because money has its own type of power, its own calculus of discipline, the fine has a much more complex relationship to power than normally imagined. The relationship to power is complex and, in some ways, elusive, but it constitutes a sociological phenomenon of the first order of importance.

CHAPTER 8

Conclusions

I began this thesis by introducing the reader to a Martian. After surveying our penal system, the Martian left us with a puzzle. Why is it that we endeavour to explain the nature of punishment with hardly any mention of the sanction most commonly used, the fine? A deceptively simple question. Nevertheless, I have tried to answer and go beyond it, and to show how that commodity in which the fine is paid, money, enters into penal relations. My analysis has been complex, but that is because the questions the study of the fine gives rise to, are not in fact simple ones at all. They concern the very basis of the penal system and of our knowledge of it. Indeed, looking back over the project as a whole, this really ought to have been evident from the beginning.

I do not intend simply to summarise what has gone before, but also to reflect a little on the significance of my argument. This can, of course, easily spill over into an intellectual onanism (to over-extend a metaphor), but there are some issues that deserve to be taken a little further.

My argument has worked at two interrelated levels. First, at the level of our knowledge of the penal system; why do we conceive of punishment in particular ways, and what are the consequences of this? Secondly, at the level of describing the penal system. The two are interrelated in as much as we approach the second level through the

conceptual lens we acquire in the first. The two levels become fused in the general images we have of the nature of punishment and of penal practice.

In the introduction and the first chapter, I tried to prise open the relationship between these levels, as it exists in the contemporary sociology of punishment. My aim was deliberately to make this relationship problematic, and the Martian was very useful in this. I tried to show that the literature explores punishment along one vector only - the relationship between punishment and various aspects of the body. It is in this context that the concentration of the literature on the prison has to be understood. The prison constitutes the present stage of development that bodily punishments have reached, although, as we saw, some now argue that we are on the point of another penal revolution concerned with the "dispersal of discipline" into the community. But in the literature, this revolution, if such it is, is discussed in the same broad conceptual framework as is the prison. By this I mean, it is discussed against a background, in which it is assumed that the most fruitful way of explaining punishment is to perceive it in terms of ^{how} power affects the body.

I set out to question this framework in two ways. First, by showing that it contained the paradox referred to in the introduction to this chapter; how can an explanation of the penal system be adequate, if it ignores that sanction most commonly used? Of course, one reply to this would be that the theories I review in the first chapter are rather modest in their scope; they do not claim to be about punishment in general, but only about the prison in particular. This objection cannot be seriously sustained. Even a cursory glance at work

in this area shows that, even if the intention was not to construct such a general account, the end product certainly ends up making such general claims. And, if this is so, then the question I pose is one that cannot be ignored or wished away. Second, I questioned the framework by calling for a reexamination of the assumption that the best way to explain punishment is in terms of, or as a derivative of power. Although, I argued, it is difficult to imagine a discussion of punishment that neglects power altogether, there are equally important sociological questions to explore. And one such set of questions concerns the relationships between punishment and the moral sentiments; between punishment and the collective conscience, to use a Durkheimian term. There are few studies these days which systematically discuss punishment in this way, and this seems strange, because it is a very traditional way of talking. Of course, what one would hope for, would be a framework that takes up both. This is a grand task, and I certainly make no claims for this thesis in this regard. But, as they say, once the question is posed, at the very least, a search for answers can begin. I hope it does. One issue that ought to figure very large on this new agenda, would be the relationship between symbols and practices. In terms of my work here, this is almost a shorthand way of capturing the relationship I see to exist between the prison and the fine. Prison symbolises our idea of punishment, but by and large, our practice is defined in terms of taking money away from people for the crimes and offences they commit. The trouble with posing the issue this way is that some may quickly seek for a "gap" between the two and, thus, we would end up with a rather tired story - what happens in "theory" is different from what happens in "practice". Surely, it is

time to stop thinking in these crude dichotomies? But these dichotomies do have a hold on us, because they simplify things; they, for example, allow us to talk about "unmasking" or "deconstructing" ideologies. An accompanying advantage of this is that it also allows us to be "critical" and, at the same time, sound very profound.

This all seems second best to the more difficult task of actually unravelling the relationships between ideas we have of punishment and the use of sanctions. If the aim of deconstructing things is to do this, then it is to be welcomed. But all too often, it turns out to stop short of this by confining itself to an analysis of "discourse" without playing the language back into its context of use.

The other two chapters in part one continue themes raised in the general introduction and the first chapter. In chapter two, I examine that phenomenon called the "cultural estrangement of punishment from money". My objective here was to capture what I see as the crucially important principle underlying the use of money in the contemporary criminal justice and penal system. The system both relies heavily on the fine, and in certain circumstances refuses to recognise it as a punishment. One such circumstance is the perceived inappropriateness of fine in cases of rape. In analysing why fines are not used in these circumstances, I was able to show the importance of "the moral sentiments" to understanding the penal system. I endeavoured to show that the phenomenon of estrangement could not be explained satisfactorily in terms of a vocabulary of power. I tried also to show that estrangement is related to broader cultural views of the nature of money and how money is seen to be connected with some of the fundamental conditions of modern social life. Again, a paradox appears;

money is seen as central to the way we live, but it is also kept at a distance from the values we esteem most highly. A similar ambiguity is said to exist in our attitude toward punishment. Although it is commonly tied to resentment and hate, punishment can also be seen as an expression of love and fraternity. These broader ambiguities feed into the criminal justice system through the process of estrangement. This makes estrangement crucial to its legitimacy.

The final chapter of part one looked at historical patterns in the use of monetary sanctions. My point was to question the received version of penal history in two ways. First, by showing that earlier systems of punishment did in fact rely heavily on all manners and sorts of monetary settlements. Second, by briefly considering the significance of this for the received ideas of the pattern and course of penal history. My point here was to suggest that we need to reconsider what I called the "rupture" model of penal history. This model perceives the history of punishment to move forward by a series of fundamental changes or revolutions. Underpinning this model is the thesis that each "mode of production" has its unique "mode of punishment". While it would be quite wrong to simply invert this model, the time has come, I believe, at least to question it. As was said in chapter 3, the medieval and contemporary systems have a similar "sanctioning structure"; heavy reliance on monetary sanctions for most crimes and offences with a much smaller category of serious crimes being dealt with by some type of bodily punishment. I hasten to say that these similarities are superficial. The "logic" underlying these sanctioning structures is very different. But, if we pause a moment and approach the question without prejudice, then these broad similarities

are striking. They certainly show how important the use of money has been to deal with crime. Perhaps, they also suggest the need for, what could be called, a "developmental" model of historical change (see Spierenberg, 1984). One which is at least willing to consider continuity over time. Such models, actually, do abound in sociology, although they seem, at the moment, to have a bad press because of their association with nineteenth century ideas of progress. But, a developmental model need not read in ideas of progress. Weber's model of the gradual unfolding of rationality in the West, does not. If anything, it is a deeply pessimistic view of history. It shows that we are all damned by the very forces which also liberate us. Rationality and individualism constrain us; the more rational our institutions become and the more we premise our forms of reasoning on a principle of formal rationality, the more we deny the substantive and the emotional. In a very real sense, we become less free.

Of existing work, the most relevant is Rusche and Kirchheimer's "Punishment and Social Structure" (1938). They discuss the fine in three places; first, in their introduction (pp.6-7), then in a short section on "Penance and Fines" in the chapter 2 (7-11), and at greatest length in chapter 10 (pp.166-177). The difficulty that arises in assessing the significance of my work for their argument, is that one is faced with a "moving target". Their book seems to work at several different analytical levels. At one level the text can be read as a straightforward piece of economic reductionism. In this interpretation their thesis concerning the fine is devastatingly simple; they can be read as arguing that the fine has a necessary connection with the capitalist mode of production. To be a little fairer to them, they say

two things; first, that the use of the fine as a general sanction presupposes a fully monetised economy; second, they seem to be saying that these conditions are only met within capitalism. If one adds to this the rather self-conscious marxism of the introduction, one ends up with the view recorded above. If this is what they are arguing, then the evidence adduced in this thesis is a serious challenge. The mere fact that fines and other monetary sanctions were used so widely in medieval society casts serious doubt on the idea that it is only in capitalism that the fine (and other monetary sanctions) becomes a general sanction. It is as well to say at this point, that the individuals who appear in the examples quoted in chapter 3, were in all probability not members of the nobility. One can be fairly sure that, if they were "titled", this would have been recorded. Also, we must remember, we looked at the use of sanctions in the ordinary courts. It would be stretching matters a little too far, to contend that, on the one hand, the medieval aristocracy were all powerful (see their chapter 2), and yet on the other, that they were quiescent enough to subject themselves to the ordinary courts of the land.

But there is another more subtle interpretation of Rusche and Kirchheimer. If we see them as arguing that the important variable is a fully monetised economy, but that this is not restricted to capitalist society, then a more interesting thesis emerges. My point is that Rusche and Kirchheimer are ambiguous about the second of these factors. They create the impression that they believe it is only in capitalism that a full money economy exists, but they do not explicitly state it. This does change how one interprets parts of their work. For a start, it means that their thesis is no longer a specifically marxist one

because they have shifted the explanatory weight away from the mode of production onto money as a variable with its own "history". This is a more discriminating and interesting thesis. Of course, there are problems with it, but it does mark a significant move away from the simple idea that every "system of production tends to discover punishments which correspond to its productive relationships" (Rusche and Kirchheimer, 1938 p.5). It moves Rusche and Kirchheimer closer to Simmel.

In his "The Philosophy of Money" (1978), Simmel traces the development of money as an autonomous force. By this, I do not mean he suggests money can be explained without relating it to broader changes in the social order, but that he treats money as representing a particular type of social relationship found in all societies. The relationship it represents is economic exchange. Simmel tries to show how and in what ways humans exchange valued objects. Money is the medium by which incommensurable objects are given a common value. He endeavours to trace how changing perceptions of value arise, and how these influence the nature of economic exchange. He then tries to demonstrate the effect money has on social order generally.

Simmel's work is very complex, but one can see how it can be made to converge with a certain interpretation of Rusche and Kirchheimer. One can see how Rusche and Kirchheimer's arguments can be extended and developed. There remain problems with what they say; for example, their comment that, "the law of feud and penance was essentially a law regulating relations between equals in status and wealth (p.8) seriously misrepresents the importance attached to ideas of penance for the medieval population in general, but a new subtlety does emerge.

However, as was said, with Rusche and Kirchheimer one is faced with a moving target, and one wonders where to aim.

My thesis does create difficulties for the general image of penal change that underlies Foucault's work. His general formula - from the corporal to the carceral - does need to be looked at afresh. Furthermore, it is not simply that one wants to question his view of the modern penal system as disciplinary. As I tried to show in the last chapter, this particular idea can be extended, although with reference to a different object than he envisaged. It is rather the broad context of his work; the casting of punishment as a "political tactic" that my work questions. This is, of course, to return to the theme about the role of moral sentiments. While I am not suggesting that one can drop the emphasis on power, I do suggest that we need to work out far more carefully the relationship between the political and the moral. This task requires that we become far more sensitive to the nuances of vocabularies and of how different vocabularies intermingle. The tracing of the histories of those vocabularies used to discuss punishment is a job for the future, but this thesis has endeavoured to put the question on the agenda.

The second part of the thesis is concerned with the place of the fine in the modern Scottish criminal justice system. First, the context is set by an analysis of sentencing patterns in the criminal courts from 1897 until 1978. Then, in chapters 5 and 6, I looked at sentencing practice from the point of view of the sentences. My aim was to try and understand the rationale - the forms of reasoning - that lay behind the use of the fine. These two forms of analysis, it is suggested, are a reasonable basis upon which to reflect more widely about the

relationship between the fine and "modernity" - that is between modern criminal justice and its most typical sanction, the fine.

Before discussing this relationship, it is worth reviewing the more particular points of interest that arise from these three chapters. First, at the methodological level, chapter four shows the important difference that including or excluding the "miscellaneous offence" has upon our knowledge of the penal system. This class of offences and lesser crimes has an obvious importance; it is a record of the bulk of the business that passes through the criminal justice system. Thus, if we are to obtain knowledge of the system as a whole, it must be included. However, it is regrettable, that the opposite tends to be true. Normally, this class is excluded both from the commentaries on the "crime problem" and from those on the penal system. As a consequence, it is doubtful if such accounts can be taken seriously as general ones. I place emphasis on the latter part of my argument. If others wish to confine their attention to particular crimes, or move broadly to the whole category of serious crimes, that is all well and good. But, if they then wish to claim a greater generality for their arguments, much, I claim, begins to "fall apart". How can such accounts claim, either implicitly or explicitly, that they are general ones, if they exclude the bulk of the "business" with which the courts deal? This is an excellent example of the effect that the cultural estrangement of punishment from money can have on sociological and criminological knowledge. It shows how preconceived ideas of the nature of punishment and the penal system influence the stories we tell about it.

Chapters 5 and 6 are in the way of being an experiment. By this I mean, I tried to synthesise two traditions of literature - empirical description of sentencing practice and the analysis of legal reasoning - that are normally kept separate. My starting point was a puzzle; both traditions explore legal decisions, but do so in markedly different ways; both have limitations, but also strengths; in the light of this, why not try and forge links? The way I went about this was by using Rawls' famous distinction between two ways of conceiving of rules and making it "empirical", the result being what I called a "normative practice". The next stage of my argument was to play this into the specific, empirical context of the Scottish criminal justice system. I endeavoured to show that sentencing took place in the context of a normative practice composed of substantive and formal legal rules. Particular decisions are a construct of the relationship drawn between those rules by sentencers.

Retrospectively, from the point of view of this conclusion, I think, perhaps there is a tendency to overemphasise the formal aspects of the process. Perhaps, to lay a little too much stress on its "rule-like" nature. This is partly due to the conceptual language used - which is an adaptation of the Weberian notion of rationality. But this is a matter of stress and emphasis, not, I believe, of getting it wrong. Using Weberian language was useful. It allowed connections to be made between the wider processes of rationalisation described in part one and the effect of this in the contemporary system. It also allowed me to emphasise the roles that substantive values play in sentencing decisions. The Scots sheriffs have a clear idea of the purposes and ends of the criminal justice system. They see the purpose of criminal

justice to be the achievement of justice by the meting out of punishment. For them, the objective is to punish people for the crimes and offences they commit. By punishment they mean retribution first and deterrence second; they are "classical" in their views. They see this to be just.

Their use of the fine is obviously influenced by this conception of punishment. The fine is easier to justify in a language of retribution than the other sanctions that are available to them for the type of crime and offence and for the type of offender with which they normally deal. This does not mean that they see the prison as "less of punishment". Rather, in the circumstances in which they work, it is more difficult to justify easily and clearly in retributive terms. Their use of imprisonment is constrained by circumstance, not necessarily by desire. One consequence of this is that the system is in many ways more lenient than they would ideally like. Also, as we saw, the fine has a potentially corrosive effect on their broader ideas of justice. The need to take into account the offender's income compromises the punitive effect after which they seek.

The analysis in chapters 5 and 6 demonstrates broader theoretical themes. It shows how different types of rationality intermingle and co-exist; it shows how substantive aims are conditioned by formal requirements and by the social context in which action takes place. This has implications for the extent to which we can use vocabularies which are premised in rationality to describe the criminal justice system. One view of law sees it as an exemplification of rationality. This view is in Weber and it is also the broader ideological view legitimating the system. The implication of my analysis is not that we

must give up this language and see the system as irrational or as a gigantic con-trick; rather, we must carefully analyse the ways in which rationality is used in practice. How substantive and formal rationality are brought together in practice; how they "play off" of one another in the process of making decision and delivering justice.

Chapter 7 looked at default. The number of criminals imprisoned for non-payment of fines in Scotland is a problem, but one, I suggest, to keep in perspective. Most people pay their fine voluntarily and without the use of default procedures. Yet at the same time, fine defaulters constitute a good proportion of the prison reception population and certainly make a notable contribution to Scotland having one of the highest rates of imprisonment per 100.000 of the population in Europe. My analysis suggests that this is due to a "culture of severity"; that sheriffs see default as a serious issue with which they must deal harshly. However, I argued also, that default is related to the voluntary nature of the fine. I contend that the fine is a voluntary sanction. Sheriffs see offenders as having a choice, whether to pay. Although the fine is situated in a larger coercive context, it is not directly coercive itself. Coercion only arises after the offender is regarded as having exercised a choice not to pay. Then, the defaulter can be imprisoned.

The voluntary nature of the fine is crucial to its place in the modern system of punishment. In the first place, it means the "state" has a minimal direct involvement in the process of punishment. Not only does this mean that the fine, as Rusche and Kirchheimer argued, is "cheap", but also it means that the state only very rarely has to actively use its coercive institutions. But, second, there is another

way in which the voluntary nature of the fine is crucial. As I argued at the end of chapter 7, the fine may be understood as a type of "auto-discipline". Offenders accept the responsibility for the administration of their own punishment. If they pay their fines, that is the end of the matter; their freedom is limited in the most rudimentary sense; if they do not, as we have said, coercion can and will be used. But the system regards them as having the power to make the decision; they discipline themselves.

There is a second sense, in which the fine is an auto-discipline, which arises from the fact that it is paid in money. Following Simmel, I argued that money places the individual in a position where he or she has continually to make choices about the value things have. Offenders can exchange their freedom for money, if they wish, by not paying their fine. Indeed, they do this also when they pay. Given the extensive use of the fine, this is the typical, most common way individuals experience the penal system. It is in this way that we ought to talk of the penal system as disciplinary. Discipline is not about "normalising" people's behaviour. Rather, in my view and in the light of the analysis of the fine contained herein, it presumes "normality"; it presumes that individuals are disciplined not by the mechanism of power, but by the medium of money. And in doing this, it both treats them with ultimate respect - it allows them choice, it presumes their rationality - and yet, at the same time, accepts that they are trapped by the need to engage in exchange.

Footnotes

Chapter One:

1. I do not pretend that what follows is a full account of the sociology of punishment. I have not tried to trace every nuance of what is a rapidly expanding discipline. Rather, I confine my attention to certain key texts and modes of explanation which I see as existing as the heart of the discipline.

2. Sociological explanation is not, of course, confined to making and constructing empirical statements - although, as a matter of judgement, I regard the best ones as always being empirically rich. My point is that, normally, empirical regularity is held to be an essential stage in identifying the wood from the trees; sorting out what is important to study and that which can wait. An explanation then builds on this but still, as is said, empirical comprehensiveness comes in at the end, when judging how 'good' the result is. The sociology of punishment appears not to recognise these conventions.

3. There has been a long-running debate in criminology as to how to conceive of the role of the victim in crime. Debate seems to divide along two lines: a causative type analysis in which assessment is made of whether the victim 'precipitated' the crime; the other type of analysis is more evangelical - to try to get the victim recognised in penal policy. Schaffer's work (1968) belongs to this second line.

4. This, of course, is not a narrow question at all. But it was seen that way by those who endeavoured to break out of correctional penology.

5. The phrase is from Foucault Discipline & Punish (1977). That the history of the prison is rendered in Foucauldian language shows the extent of his influence.

6. Foucault does pay some attention to fines, but only in a rather marginal way.

7. This is a problematic method. It assumes both some sort of continuity over time and that different different cultures can be understood. But unless such an assumption is made it is difficult to see how anthropological or cross-cultural work could ever be possible.

8. Such explanations are not solely concerned with power. Rather it forms the presumed context. Hence if attention is given to symbols then this is interpreted as an aspect of power. Foucault is particularly prone to this, but the same tendency can be seen in Cohen (1985).

9. To reinforce my point, I think Cohen is very aware of the Kuhnian overtones; i.e. he sees analysis of the penal system in terms of the prison as 'normal science'.

10. My point is that 'going native' does not solve the problem. One can understand a practice from the inside but still see its limitations. If one sees its limitations, then it is, thereafter, difficult to put them to one side.

11. Finis (1972) argues that all sentences used by a criminal court must have some punitive element to them. He argues that this follows from them being used in a criminal court.

Chapter Two:

1. Once money was commonly used; see Chapter Three.

2. See discussion of focal meaning in Chapter One.

3. If this were not so then we would be faced with an interesting idea; we would have to say that, for most of the time, the penal system does not deliver punishment. This is a tempting position to advocate, but I do not think the criminal justice system could retain its legitimacy and admit that it is not concerned with punishment. See footnote 11, Chapter One.

4. I am not suggesting that the whole of modern political theory can be understood this way. Nevertheless, it is an interesting way of thinking about one of the central issues of political theory - that is the proper balance to be drawn between individual freedom and legitimate collective control. Being something of an anarchist, I have some sympathy with Nozick, but would ask to distance myself from the conservatism of his approach.

5. An effective modern adaptation of this Aristotelian idea is produced by Finnis (1983 - chapter on punishment).

6. For the English, delict is broadly similar to tort.

7. I am aware of the work of American scholars like Becker who has endeavoured to do something like this. I understand such work has great influence in America. It is interesting that it has yet to have the same influence in Britain, despite the present vogue of monetarism.

Chapter Three:

1. As I argue later, too sharp a distinction can be drawn between Royal justice and local justice. The two were interwoven and mutually supportive.

2. As we shall see, the story is not completely wrong. Argument at this level of generality must be 'right' some of the time. My point is that the notion of compensation as work is a very modern one which carries a whole associated conceptual baggage. It is this which constitutes the problem.

3. The English pattern is different. Although it is probably wrong to see England as totally isolated from the rest of Europe (Reynolds 1986), Royal Justice, the King's Peace, developed earlier than in other jurisdictions. This meant prosecution on a developed system of indictment emerged very early on (13th century). On this see *Milsom* (1976).

4. There is a debate, as I indicate, over how independent the Regalities were. Some regalities were tiny affairs and it is difficult to imagine them as 'sub-kingdoms'. Also, the strength of the Sovereign can be seen in that the grants setting up the Regality could and were sometimes reduced (see *Kames*, 1792). Much probably depended on how powerful the noble was: if the noble was on good terms with the monarch or seen as necessary to the governance of the realm.

5. During the interregnum the sheriff court did come more to prominence (see *Davies* 1980).

6. Not all contemporaries kept to this way of putting the issue. Some used the notion of Delict and then subdivided into public (crime) and private (see *Pitmedden* 1699). The terminology adopted may well be related to the attitude held to Roman Law.

7. It is instructive to note that Duncan translates *Vindictam* as "to the public compensation". He says: "I have translated *vindictam* as 'compensation' because this is a meaning allowed by the Medieval Latin Word List; it has the sense of 'surety' here. I doubt if the translation 'vengeance' is meaningful in this context". (*Duncan* 1975, p201).

8. Of course, the distinctions used between public and private contain the germ of the modern division between the criminal and the civil law. But this is a different point.

9. There are many cases in *Pitcairn* of prosecution for bringing in Englishmen. This was a treasonable act.

10. Other terms used include *fredus* and *freum*. As von Bar (1916 p61 n13) argues, the *fredus* is thought to have been a voluntary payment or present given to the chief of the tribe. *Kames* uses *fredus* in a law tract as the name for 'making fine' (*Kames* 1792).

11. At the risk of speculation, the feudal superior standing surety may have been one way in which the system dealt with those who did not have money. Also this practice emphasises

how much weight was put on maintaining peace.

12. Dole is derived from the Roman *delus*. For a somewhat elaborate, esoteric discussion, see von ~~B~~^B (1916 p11-12).

13. For a more sustained attempt to apply Bossy's ideas to Scotland, see Brown, Chap. 7 (Brown 1986).

14. For more on the nature and effects of the Reformed Church see Wormald (1981 part II) and Donaldson (1980).

15. For a more discriminating discussion of Rusche & Kirkheimer see the conclusion to this thesis.

Chapter Five:

1. I say this because the existing literature acts as a sort of 'fair-witness' against which to test the credibility of ^qe's own interpretation. This gives the exercise a greater sense of 'objectivity'.

2. Sentencers do see themselves as 'weighing the importance of different factors' when making a decision. My point is that they do not see this as a determinate process. Rather, when they use the term 'factor' they are drawing analogies with a logic exercise or just meaning meaning item of information. This is a quite different sense than that in which the term is used in factual explanations in a behavioural framework.

3. Practitioners of the empirical tradition would probabaly^b reject the use of the term 'behaviourism' to characterise their approach. My use of it is influenced by Hogarth's critique of the approach.

4. Those who work in the area seem to prefer the term 'hermeneutic', presumably to distance themselves from the school of phenomenology associated with Husserl.

5. This paradox shows how loosely all the terms, particularly positivism, are used in the literature. Positivism means variously a commitment^M to 'science', advocacy of the 'is' versus the 'ought' distinction, to the more 19th century notion that knowledge leads to progress. it is in the latter sense that, for example, Durkheim is a positivist.

6. This is, perhaps, a little unfair. MacCormick also sees deduction of this sort as 'minimal'. His discussion of legal reasoning is much richer than I have time to demonstrate^a here.

7. I think Atiyah is being a little unfair in the sense I describe above.

8. In some ways it is unnecessary to preface the notion of 'practice' by the adjective 'normative'. A practice, in the sense I develop the term, must be normative. I use the adjective to reinforce my argument.

9. Rawls' discussion is set in the context of a debate about different aspects of unilateralism. I have rather ignored this side of Rawls' essay as I want to develop his argument in line with my broader purposes. Carlen (1976) uses Rawls' work as well but, I submit, does not fully develop its potential.

10. The more recent sociologists I refer to may well reject this association. I do not mean to imply that the work of Carlen and McBarnet is related to American legal realism in a 'history of ideas' sense. Rather, I mean an analogous type of antiformalist argument is at work. However, I do think it is reasonable to use the term 'legal realist' or 'realism' precisely because the purpose is to demask and demystify. There is an implicit dichotomy at work; formalism versus realism. There are clear political and ideological overtones at work also. Realism is, in some ways, an assault on 'rule of law' ideology.

11. It is perhaps a little unfair to treat Dworkin or MacCormick as formalists - if this is an implication of my argument. I am aware that within jurisprudential terms, their work is an attempt to move away from a narrow formalism.

12. This is an important question. Very often the notion of rule as used in jurisprudence seems very narrow. To be a rule a statement is treated as if it must contain an imperative - 'you will do', 'you will not do'. It is interesting to reflect on how closely this trait is tied up with the need for precision in actual legal decision-making.

Chapter Seven:

1. The interviews conducted with imprisoned defaulters probably deserve greater analysis than I have time and space to provide here. They were conducted in sometimes very difficult conditions on the 'wings'. One reason I have not paid them too much attention is because the 'quality' of the tape recording proved poor due to technical difficulties. I use them thus to illustrate rather than as a source of data to analyse deeply.

2. The earlier volumes of judicial statistics contain extremely useful commentaries in the preface. They are often fine examples of descriptive sociology. The quality of these commentaries declines after the statistics are divided into the criminal and civil judicial statistics. This happened in the mid-1920s. Could this be an aspect of the growing secrecy of the system?

3. This may seem rather obvious, but, in discussion, I have found that others do regard it as an enforcement procedure.

4. I do think, now, that this traditional charge or criticism of Rusche & Kirkheimer is too easily overstated. Part of the problem is the unevenness of the book. It was written by the 'authors' separately and not in collaboration. As I understand it the chapter on the fine and the introduction were added by Kirkheimer after Rusche's death (Melossi). In actual fact I think the book is a good deal less Marxist than reputation suggests.

5. I am not suggesting that 'nothing has changed' historically. I use the old term to emphasise a point.

Bibliography

Allen, F. (1981): The Decline of the Rehabilitative Ideal. (New Haven, Yale University Press).

Ashworth, A. (1983): Sentencing and Penal Policy. (London, Weidenfeld & Nicolson).

Atiyah, P. (1987): Pragmatism & Theory in English Law. (London, Stevens & Sons).

"Balfour's Practicks" (1597): Stair Society Vol 21, 22. ed. P. McNeill.

Bankowski, Z., Hutton, N. and McManus, J. (1987): Lay Justice. (T.T. Green, Edinburgh).

Berlin, I. (1969): Four Essays on Liberty (Oxford, O.U.P.).

Black, R. (1975): 'A Historical Survey of Political Liability in Scotland for Personal Injuries and Death' in Comparitive & International Law Journal of South Africa VIII.

Black, R. (1987): 'Monetary Penalties'. Unpublished paper given at Conference on Current Issues in Sentencing, University of Edinburgh.

Bottoms, A. (1973): 'The Efficacy of the Fine'. Criminal Law Review 534.

Bottoms, A. & MacLean, D. (1976): Defendants in the Criminal Process (London, Routledge & Kegan Paul)

Bottoms, A. (1977) 'Reflections on the Renaissance Dangerousness' - Harvard Journal
Bottoms, A. (1983): 'Neglected Features of Contemporary ^{16, 2.} Penal Systems' in D. Garland & P. Young (eds.) The Power to Punish (London, Heineman).

Blumberg, A. (1967): Criminal Justice (Chicago, Quadrangle).

Bossy, J. (1985): Christianity in the West 1400-1700 (Oxford, O.U.P)

Bossy, J. (ed). (1983): Disputes & Settlements Law and Human Relations in the West (Cambridge, C.U.P).

Brown, J. (1977): 'The Exercise of Power' in Brown, J, (ed.) Scottish Society in the Fifteenth Century (London).

Brown, K. (1986): Bloodfeud in Scotland 1573-1625 (Edinburgh, John Donald).

Buchanan, G. (1579): The Right of the Kingdom in Scotland, translated by McNeil, D. (Glasgow, 1964).

Burrow, J.W. (1981): A Liberal Descent: Victorian Historians and the English Past. (Cambridge, C.U.P.).

Cairns, J. (1987): 'John Millar's Lectures on Criminal Law'. Unpublished.

Carlen, P. (1976): Magistrates' Justice. (London, Martin Robertson).

Casten, N. (1983): 'The Arbitration of Disputes under the Ancien Regime', in Bossy, J. (ed.) Disputes and Settlements.

Clanchy, M. (1983): 'Law and Love in the Middle Ages', in Bossy, J. (ed.) Disputes and Settlements.

Cohen, S. (1974): 'Criminology and the Sociology of Deviance in Britain' in Rock, P. & McIntosh, M. (eds.) Deviance and Social Control (London, Tavistock).

Cohen, S. (1979): 'The Punitive City. Notes on the Dispersal of Social Control' in Contemporary Crises 3 October 1979.

Cohen, S. (1985): Visions of Social Control (Polity Press, Cambridge).

Cotterrell, R. (1986): 'Law & Sociology'. Journal of Law & Society Vol 13, No.1

Cousins, M. & Hussain, A. (1984): Michael Foucault. (London, MacMillan).

Craig, T. (1732): Ius Feudale, translated by Clyde, J. (2 Vols. Edinburgh 1934).

Daig, B. (1981): 'Debt Enforcement'. (Scottish Home & Health Department, HMSO).

Davies, S. (1980) *The Courts and the Scottish legal system 1600-1747 in Gatrell et al*
 Davies, W. & Foweraker, P. (1986): The Settlement of Disputes in Early Medieval Europe. (Cambridge, C.U.P.). (1980)

Dickinson, W. (1928): Sheriff Court Book of Fife (Edinburgh, Scottish History Society 3rd series, Vol 12.).

Donaldson, G. (1960): The Scottish Reformation. (Cambridge, C.U.P.).

Duncan, A. (1975): Scotland: the making of the Kingdom. (Edinburgh, Edinburgh University Press).

Dunpark, Lord (1977) : Report of the Committee on Reparation by the Offender to the Victim. (HMSO. Cmd. No. 6802).

Durkheim, E. & Mauss, M. (1863): Primitive Classifications (London).

Durkheim, E. (1964): The Division of Labour in Society. (London, Routledge & Kegan Paul).

Durkheim, E. (1976): Elementary Forms of Religious Life. (London, Routledge & Kegan Paul).

Durkheim, E. (1983): 'Two Laws of Penal Evolution' in Lukes, S. & Scull, A. Durkheim and the Law. (Oxford, Blackwells).

Dworkin, R. (1977): Taking Rights Seriously (Duckworths).

Elias, N. (1982): The Civilising Process (2 vols, Oxford).

Finnis, J. (1972): 'Meaning and Ambiguity in the Philosophy of Punishment' (Review of Hogarth, Sentencing as a Human Process) Osgoode Law Journal Vol. 10.

Finnis, J. (1983): Natural Law and Natural Rights. (Oxford, O.U.P.).

Foucault, M. (1977): Discipline & Punish: The Birth of the Prison. (London, Allen Lane).

Forbes, D. (1973): Hume's Philosophical Politics. (Cambridge, C.U.P.).

Fox, J. (1927): The History of Contempt of Court. (Oxford, Clarendon Press, reprinted by Professional Books, 1972).

Fuller, L. (1964): The Morality of Law (revised edition, New Haven, Yale University Press).

Gane, C. (1983): 'The Effect of a Pardon in Scots Law' in Juridical Review.

Garland, D. (1983): 'Durkheim's Theory of Punishment: a critique', in Garland, D. & Young, P. (eds) The Power to Punish (London, Heineman).

Garland, D. & Young, P. (1983): 'Towards a Social Analysis of Penality' in Garland, D. & Young, P. The Power to Punish (London, Heineman).

Garland, D. (1984): 'The Punitive Mentality: socio-historical development & decline'. 10 Contemporary Crises.

Garland, D. (1985): Punishment & Welfare (Gower).

Garland, D. (1986): 'Foucault and the Sociology of Punishment' (unpublished paper)

Gaudet, F.J. et al (1933): 'Individual Differences in the Sentencing Tendencies of Judges'. Journal of Criminal Law, Criminology and Police Science Vol. 23, p811.

* Gabriel V. Lenman B, Parker G (Eds) (1980) Crime and The Law
The Social history of Crime in Western Europe since 1500,
 (London Europa Press).

Geertz, G. (1973): The Interpretation of Cultures. (New York).

Giddens, A. (1979): General Problems in Social Theory (London, MacMillan).

Grebking, G. (1982): The Fine in Comparative Law: a survey of 21 countries (Cambridge, Institute of Criminology, Occasional Paper No. 9).

Green, E. (1961): Judicial Attitudes in Sentencing (London, MacMillan).

Gusfield, J. (1984): The Culture of Public Problems; drinking, driving and the symbolic order. (Chicago, University of Chicago Press).

Hall, J. (1987): Powers and Liberties. (Handsworth, Penguin).

Harding, A. (1973): The Law Courts of Medieval England (London).

Hart, H. (1961): The Concept of Law (Oxford, O.U.P.).

Hart, H. & Honore, T. (1986): Causation and the Law (Oxford, O.U.P.).

Hay, D. (1975): 'Property, Authority and the Criminal Law' in Hay, D. et al Albion's Fatal Tree (New York, Pantheon).

Hogarth, J. (1971): Sentencing as a Human Process (Toronto, University of Toronto Press).

Hood, R. & Sparks, R. (1972): Key Issues in Criminology (London, Weidenfeld & Nicolson).

Hood, R. (1968): Sentencing in Magistrates' Courts. (London, Stevens).

Hood, R. (1972): Sentencing the Motoring Offender. (London, Heineman).

Hont, I. & Ignatieff, M. (1985): Wealth and Virtue (Cambridge, C.U.P.)

Hume, D. (1844): Commentaries on the Law of Scotland Respecting Crimes (4th edition, Edinburgh).

Ignatieff, M. (1978): A Just Measure of Pain: The Penitentiary and The Industrial Revolution. (New York, Pantheon).

Ignatieff, M. (1981): 'State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment' in Crime and Justice Vol. 3 ed by Tonsy, M. & Norval Morris (University of Chicago Press, Chicago &

* Howard J. (1929) State of the Prisons (Everyman edition)

London).

Jamieson, F. (1981): The Political Unconscious. (New Haven, Yale University Press).

Johnston, T. (1974): The History of the Working Classes in Scotland (Wakefield, E.P. Publishing).

Kames, H. (1792): Historical Law Tracts (4th ed. Edinburgh, Bell & Bradfute).

Kelsen, H. (1961): General Theory of Law and State. (New York, Russell & Russell).

Kitsune T. + C. Lowel, A. (1963) 'A note on the uses of official statistics' *Social Problems*
Larner, C. (1981): Enemies of God. (Oxford, Blackwells).", 131-139

Latham, C. (1973): 'Enforcement of Fines'. Criminal Law Review 357

Lenman, B. & Parker, G. (1980): 'The State, The Community and The Criminal Law in Early Modern Europe' in Gatrell, V., Lenman, B. and Parker, G. (eds) Crime and The Law, The Social History of Crime in Western Europe since 1500. (London, Europa Press).

LLewellyn, K. (1960): The Common Tradition: deciding appeals. (Boston).

Lukes, S. & Scull, A. (1983): Durkheim and The Law (Oxford, Blackwells).

MacCormick, N. (1974): 'Law as Institutional Fact' in Law Quarterly Review 102.

MacCormick, N. (1978): Legal Reasoning and Legal Theory. (Oxford, Clarendon, O.U.P.).

MacCormick, N. (1982): Legal Right and Social Democracy. (Oxford, O.U.P.).

McBarnet, D. (1981): Conviction. (London, MacMillan).

MacFarlane, A. (1981): The Justice and The Mare's Ale: Law and Disorder in Seventeenth Century England. (Oxford).

MacKenzie, G. (1722): Collected Works Vol 2 (4th edition, Edinburgh).

McClintock, F.H. and Avison, N.H. (1968): Crime in England and Wales. (London, Heineman).

MacTaggart, R.A. (1968) (1968): Punishment as Applied by the Ordinary Criminal Courts from 1400 to 1747. (Glasgow, unpublished).

Maine, H.S. (1905): Ancient Law. (London).

- Mannheim, H. (1939): Dilemmas of Penal Reform. (London, Allen & Unwin).
- Mathiesen, T. (1983): 'The Future of Control Systems' in Garland, D. & Young, P. op cit.
- Matza, D. (1963): Delinquency and Drift. (New York, Wiley).
- Mauss, M. (1985): 'The Category of the Human Mind: the notion of person; the notion of self'. (1938. Reprinted in The Category of the Person, Carrithers, M. Collens, S., Lukes, S. Cambridge, C.U.P.).
- Mead, G.H. (1964): 'The Psychology of Punitive Justice' in Coser, L. & Rosenberg, Sociological Theory. (New York, MacMillan).
- Melossi, D. (1977): 'The penal question' in Crime & Social Justice Vol 6 summer 1977 p26.
- Melossi, D. & Pavarini, M. (1981): The Prison and the Factory: Organisation of the Penitentiary System. (London, MacMillan).
- Millar, A. (1984): The Experimental Introduction of Fines Enforcement Officers into Two Sheriff Courts. (Edinburgh, Central Research Unit Papers, HMSO).
- Milsom, D. (1976): The Legal Framework of English Feudalism (Cambridge, C.U.P.).
- Morgan, R. & Bowles (1981): 'Fines: the Case for Review'. Criminal Law Review 203.
- Nicholson, C. (1985): The Law and Practice of Sentencing in Scotland. (Edinburgh, T.T. Green).
- Nozick, R. (1974): Anarchy, State and Utopia. (Oxford, Blackwells).
- Packer, H. (1968): The Limits of the Criminal Sanction. (Stanford, Stanford University Press).
- Parsons, T. (1949): The Structure of Social Action. (Glencoe, Free Press).
- Pahukanis, E. (1968): Law and Marxism: A General Theory. (London).
- Passas, N. (1985): 'Reports on Probation'. (Edinburgh. Unpublished Report submitted to The Scottish Home and Health Department).
- Paterson, A. (1982): The Law Lords. (London, MacMillan).

Pitcairn, R. (ed). (1833): Criminal Trials in Scotland from 1488 to 1624. (Edinburgh, Tait).

Pocock, J. (1975): The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Traditions. (Princeton, Princeton University Press).

Pocock, J. (1983): 'Cambridge Paradigms and Scotch Philosophers' in Ignatieff, M. & Hont, I (eds.) Wealth and Virtue. (Cambridge, C.U.P.).

Pocock, J. (1987): Virtue, Commerce and Industry. (Cambridge, C.U.P.).

Pollock, F. & Maitland, F.W. (1898): The History of English Law before the time of Edward I. (Cambridge).

Radzinowicz, L. & Hood, R. (1986): The History of the English Criminal Law Vol 6: The Emergence of Penal Policy. (London, Stevens).

Rawls, J. (1967): 'Two Concepts of Rules' in Foot, P. (ed.) Theories of Ethics. (Oxford).

Reddy, W. (1987): Money and Liberty in Modern Europe. (Cambridge, C.U.P.).

Renton, R. & Brown, H. (1909): Criminal Procedure according to the Law of Scotland. (Edinburgh, W.Green & Sons).

Reynolds, S.C. (1984): Kingdoms and Communities in Western Europe 900-1300. (Oxford, Clarendon Press).

Rothman, D. (1971): The Discovery of Asylum. (Boston, Little Brown).

Rothman, D. (1980): Conscience and Commerce: The Asylum and Alternatives in Progressive America. (Boston, Little Brown).

Rusche, G. & Kirkheimer, O. (1938): Punishment and Social Structure. (New York, Russell & Russell).

Schaffer, S. (1968): The Victim and His Criminal. (New York, Randon House).

Scottish Council on Crime (1975): Crime and the Prevention of Crime. (Scottish Home & Health Department. HMSO).

Scull, A. (1977): Decarceration: Community Treatment and the Deviant - a Radical View. (Englewood Cliffs, N.J. Prentice Hall).

Scull, A. (1979): Museums of Madness: The Social Organisation of Insanity in Nineteenth Century England. (London, Allen Lane).

Searle, J. (1967) 'How to derive an ought from an is' in Foot, P. (ed.) Theories of Ethics
 Sharpe, J. (1983): 'Such Disagreement Betwix Neighbours: (Oxford)

Litigation and Human Relations in Early Nineteenth Century England' in Bossy, J. (ed) op cit.

Scheld, J. & Duncan, J. (1964): The State of Crime in Scotland. (London, Heineman).

Kidnack J (1983) 'Review of D. McBurnat Conviction', Law of Crime, Criminology & Criminal Law.

Simmel, G. (1978): The Philosophy of Money. (London, Routledge & Kegan Paul).

Simmonds, N.E. (1984): The Decline of Juridical Reason: Doctrine & Theory. (Manchester, Manchester University Press).

Skinner, Q. (1978): The Foundations of Modern Political Thought (2 vols; Cambridge, C.U.P.).

Skinner, Q. (1984): 'The Idea of Negative Liberty: philosophical and historical perspectives' in Rorty, R. et al Philosophy in History. (Cambridge, C.U.P.).

Smith, A. & Gordon, J. (1972): 'The Enforcement of Fines'. Scots Law Times.

Softley, P. (1973): A Survey of Fine Enforcement. (Home Office Research Study 16. London, HMSO).

Softley, P. (1978): Fines in Magistrates' Courts. (Home Office research Study 46. London HMSO).

Sparks, R.F. (1973): 'The Enforcement of Fines: the process from sentence to committal'. British Journal of Criminology 13, 92-107.

Spireburg^e~~x~~, P. (1985): The Spectacle of the Scaffold. (Cambridge, C.U.P.).

Spitzer, S. (1975): 'Punishment and Social Organisation: a study of Durkheim's theory of penal evolution'. Law and Society Review 9.

Stone, L. (1977): The Crisis of the Aristocracy 1558-1641. (Oxford, Clarendon Press).

Stone, L. (1983): 'Interpersonal Violence in English Society 1300-1900'. Past and Present 101.

Stewart Committee (1983): Keeping Offenders Out of Court: Further Alternatives to Prosecution. (HMSO. Cmd No. 8958).

Thomas, D. (1970): The Principles of Sentencing. (London, Heinemen).

Thompson, D. (1986): Rights, Restitution and Risk. (Harvard, Harvard University Press).

Thompson, E.P. (1975): Whigs and Hunters. (London, Allen Lane).

Topham, E. (1776): Letters from Edinburgh. (Edinburgh, James Thin).

Van Caenegem, R. (1959): Royal Writs in England from the Conquest to Glanvill. (London, Selden Society).

Van Caenegem, R. (1973): The Birth of the English Common Law. (Cambridge, C.U.P.).

Von Bar, C. (1916): A History of Continental Criminal Law. (London, John Murray).

Walker, N. (1985): Sentencing: Theory, Law and Practice. (London, Butterworths).

Weber, M. 1966: The Theory of Social and Economic Organisation (N. York Free Press)
 Weisser, M. (1982): Crime and Punishment in Early Modern Europe. (Brighton, Harvester Press).

Willock, I. (1987): 'Lay Justice?' (Dundee. A review of Bankowski Z. et al in SCOLAG, July issue, No. 130).

Wormald, J. (1983): 'The Blood Feud in Early Modern Scotland' in Bossy, J, op cit.

Wormald, J. (1986): Bonds of Manrent. (Edinburgh, John Donald).

Wormald, J. (1981): Court, Kirk and Community. (London, Edward & Arnold).

Whimster, S. & Lash, S. (eds.) (1987): Max Weber, Rationality and Modernity. (London, Allen & Unwin).

Wootton, B. (1970): ACPS Report on Non-Custodial and Semi-Custodial Penalties. (London, HMSO).

Young, P. (1983): 'Sociology, the State and Penal Relations', in Garland, D. & Young, P. The Power to Punish. op cit.

Young, P. (1986): 'Review of S. Cohen's Visions of Social Control'. Sociological Review, summer 1986.